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No. _____

In the

Supreme Court of the United States

October Term, 1997

RUSSELL H. VOLKEMA and LOIS J. VOLKEMA,
Petitioners,

v.

STATE OF MICHIGAN; DEPARTMENT OF NATURAL RESOURCES, and ROLAND HARMES, Director of Department of Natural Resources,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government puts a discrete, independently viable 6-acre parcel of land to public use for wetlands preservation, thereby depriving the owners of all economically beneficial use of their property, may the government avoid the constitutional requirement of just compensation merely because the 6-acre segment is included within a larger, 24.6-acre tract?

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Petitioners Russell H. Volkema and Lois J. Volkema respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals, entered in the above-entitled proceeding on October 20, 1995.

OPINIONS BELOW

The decision of the Court of Appeals of the State of Michigan is reported as *Volkema v. Department of Natural Resources*, 542 N.W. 2d 282 (1995), and is reproduced as Appendix (App.) B. The final judgment of the Michigan Court of Claims is unreported and is reproduced as Appendix C. Page references are to the versions in the appendices.

JURISDICTION

The opinion of the Court of Appeals of the State of Michigan which is the subject of this petition was filed and entered on October 20, 1995. App. B. The order of the Michigan Supreme Court denying Petitioners' application for leave to appeal was entered on June 9, 1998. App. A. The Michigan Court of Appeals considered and decided the question of whether the state's denial of all economically beneficial use of an approximately six-acre segment of Petitioners' land comprised an uncompensated regulatory taking of Petitioners' property in violation of the Fifth Amendment to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

STATEMENT OF THE CASE

Russell and Lois Volkema (Volkemas) own 24.6 acres of commercial property in Kentwood, Michigan.[1] This land was originally part of a larger parcel the Volkemas had been progressively developing since they acquired the property in 1963.[2] The Volkemas made extensive investments in infrastructure over the years, and the property has an assessed value in excess of $20,000 per acre.[3] The property is zoned commercial and is situated in a prime commercial development area.[4]

Seventeen years after the Volkemas acquired and began developing their property, the State of Michigan adopted the Wetland Protection Act.[5] Under authority of this Act, the Michigan Department of Natural Resources classified 4.3 acres of the Volkemas' property as wetlands.[6]

In 1991, the Volkemas proceeded with plans to complete development of their 24.6 acres as a water park, in conjunction with such a park already operating on a contiguous 10-acre parcel. This final stage of development would require filling the 4.3 acres of wetlands. When the Volkemas applied to the Michigan Department of Natural Resources (MDNR) for the necessary permits, however, their applications were denied.[7]

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[1] App. B-1.

[2] *Id.*

[3] App. F-1-2.

[4] App. D-1.

[5] App. B-2.

[6] *Id.*

[7] App. F-2.

The effect of MDNR's denial was to require the 4.3 acres to be used exclusively for wetlands preservation. The denial deprived the Volkemas of all economically beneficial use of the irregularly shaped 4.3-acre parcel. In order to square off the boundaries of the preservation area, a surrounding 1.4 acres of the Volkemas' land was also rendered useless to them.[8]

In response to this loss of all productive use of approximately six acres of commercial property, the Volkemas sued MDNR in the Michigan Court of Claims for a regulatory taking of their property. Relying on this Court's holding in *Lucas v. South Carolina Coastal Council*,[9] the Volkemas argued that the uncompensated denial of all economically viable use of a discrete, well-defined six-acre segment of their property comprised a categorical violation of the Takings Clause.[10] The federal question now being brought to this Court was first raised in Petitioners' complaint,[11] and was forcefully urged at each step of the proceedings in the trial court and court of appeals.[12]

Just as the trial court in *Lucas* found the property in that case to be rendered "valueless" by the Beachfront Management Act,[13] the trial court below found that MDNR's wetlands classification and permit denial left the affected segment of the

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[8] App. D-1.

[9] 505 U.S. 1003 (1992).

[10] App. D-2-3.

[11] Complaint, Court of Claims Case No. 91-13914-CM, dated October 29, 1991, at 4.

[12] Brief of Plaintiffs/Appellants, Michigan Court of Appeals No. 1598230, dated February 19, 1993, at 2.

[13] 505 U.S. at 1007.

Volkemas' land "unusable."[14] However, the trial court held that the relevant parcel for purposes of Fifth Amendment takings analysis was not the 4.3 acres the state required to be utilized as a wetlands preserve, nor the 6 acres that MDNR's permit denial had rendered unusable to the Volkemas, but the Volkemas' entire 24.6-acre holding. The court analogized the denial of all beneficial use of a discrete segment of the Volkemas' property to ordinary zoning setback requirements "that limit or prohibit the ability of an owner to develop part of their property."[15] Because the state "only" required one-fourth of the Volkemas' total holdings to be used exclusively for wetlands preservation, the court found no taking had occurred.[16]

The Michigan Court of Appeals affirmed. Citing to *Lucas*, the appellate panel acknowledged that because of MDNR's actions the Volkemas had been "deprived of all the economically beneficial use of their land."[17] Nevertheless, the court below found no taking had occurred. Referring to this Court's opinion in *Penn Central Transportation Corp. v. City of New York*,[18] the court of appeals affirmed that the relevant parcel for determining takings liability consisted of the Volkemas' entire 24.6 acre holding:

> We conclude it would be contrary to the holding in *Penn Central* to extract portions of a property and

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[14] App. D-1.

[15] App. D-3.

[16] *Id.*

[17] App. B-4.

[18] 438 U.S. 104, 130 (1978).

> examine those portions piecemeal when determining the effect of a land-use regulation on the property.[19]

In dissent, Judge Sawyer pointed out a key distinction between cases such as this one, in which regulations carve out a discrete segment of land and press it into public use, and those in which regulatory restrictions merely diminish the value of some overall larger tract.

> The effect of the Wetland Protection Act . . . and of defendant's denial of a fill permit is to preclude utterly the use of a portion of plaintiffs' property. Plaintiffs are not free to choose what portion of their property to develop. Rather, the regulation allows development of a specific portion of the property and absolutely precludes the development of another portion of the property.[20]

Under these circumstances, where the state's regulations have themselves divided real property into independent, discrete segments and pressed one of the newly defined parcels into public service, a taking should be found "with respect to the identifiable portion which cannot be used."[21]

For purposes of applying *Lucas*' categorical takings rule, the dissent below recognized that it is not constitutionally relevant whether the land owner possesses other holdings in addition to what the state has converted to public use by operation of its regulations.

> What is relevant is that the government has determined that a public purpose would be served by denying the rightful owner of the property the use of

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[19] App. B-8 n.7.

[20] App. B-12 (Sawyer, J., dissenting) (citation omitted).

[21] App. B-13 (Sawyer, J., dissenting).

> that property and requiring it to be used, or in this case not used, in accordance with that public purpose. While the government is permitted to do this, it must compensate the property owner for putting the property to public use. Our historical protection of private property in the constitution allows no less.[22]

The Michigan Supreme Court held the Volkemas' application for leave to appeal in abeyance for 14 months, finally denying it on June 9, 1998.[23] The Volkemas now file this petition for writ of certiorari, hoping that this Court will take up the important constitutional issue it left open in *Lucas* and decide whether a categorical violation of the Takings Clause occurs where a discrete, well-defined segment of real property is carved out and devoted exclusively to public use by operation of environmental or other land use regulations.

REASONS FOR GRANTING THE PETITION

I

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW LEFT OPEN BY *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL* THAT MUST BE RESOLVED BY THIS COURT

In *Lucas v. South Carolina Coastal Council*, this Court declared that land use restrictions that deprive owners of all economically beneficial use of their property trigger the requirement for just compensation under the Takings Clause of the Fifth Amendment.[24] The *Lucas* opinion candidly admitted, however, that

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[22] *Id.*

[23] App. A.

[24] *Lucas*, 505 U.S. 1003.

> the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[25]

The uncertainty surrounding this issue has imposed heavy costs on property owners, as illustrated by the case at bar. Petitioners respectfully submit that the time has come for this Court to revisit the issue of partial categorical takings left open in *Lucas*. In particular, Petitioners urge this Court to clarify that *Lucas*' categorical takings rule comes into play whenever a discrete, independently viable segment of real property is carved out of a larger parcel and put to exclusively public use by operation of state land use controls.

The so-called "denominator problem," the task of determining the relevant parcel for Fifth Amendment takings claims, is "[o]ne of the most troubling areas in current takings jurisprudence."[26] The doctrinal importance of this issue has been well summarized by Professor Epstein:

> The protection afforded by the eminent domain clause to each part of an endowment of private property is equal to the protection it affords the whole—no more and no less. No matter how the

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[25] *Lucas*, 505 U.S. at 1016 n.7.

[26] Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L. J. 663, 725 (1996).

> basic entitlements contained within the bundle of ownership rights are divided and no matter how many times the division takes place, all of the pieces together, and each of them individually, fall within the scope of the eminent domain clause.[27]

In *Lucas*, this Court found the deprivation of all economically viable use of David Lucas' two beachfront lots gave rise to a categorical taking (barring a showing that the owner's proposed property use was foreclosed by state common law principles).[28] Compensation was required because the enactment of South Carolina's Beachfront Management Act had displaced the entirety of Mr. Lucas' rights of dominion and control over the use of his property. But the state would have taken no less if Mr. Lucas had happened to own a third lot, on which he could build. If Mr. Lucas had all along owned a third parcel on the Isle of Palms, located inland of the "no-build" line established by the Beachfront Management Act, would this have altered the outcome of his case? There is no reason to believe that fact would have been relevant to the takings analysis. As Professor Epstein notes,

> Prima facie, compensation must be paid for the land taken no matter how much land the owner retains. . . . In the case [where the state takes two acres of land from a four-acre parcel], what is decisive is that which is taken, not that which is retained. It matters not if the claimant owns only the two acres taken or the full four acres; the obligation to compensate is constant in either case.[29]

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[27] Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 57 (1985).

[28] 505 U.S. at 1029-31.

[29] Epstein, *Takings* at 57-58.

There are doctrinally important reasons for this Court to clarify that *Lucas'* categorical rule applies to the taking of discrete, independently viable parcels of real property, even when these parcels comprise less than the totality of an owner's property holdings. Such a rule is especially compelling in cases like the one at bar, where the government has imposed its own preferred use of the property in place of the owners' reasonable investment-backed expectations. The state and federal courts are in conflict on this important question of Fifth Amendment interpretation, adding to the urgency of the need for this Court to resolve this issue.

A. When the Government Deprives an Owner of All Beneficial Use of a Discrete, Independently Viable Segment of Real Property, *Lucas' Per Se* Takings Rule Should Be Triggered

There are compelling reasons for this Court to apply *Lucas'* categorical takings rule to the regulatory deprivation of all beneficial use of a discrete, independently viable segment of real property. Deprivations such as those imposed by MDNR in the case at bar entail the assertion of *complete dominion and control* over real property by the state, for which compensation has traditionally been required. The segment of property that has been rendered unusable had *independent economic viability* prior to application of the regulations at issue. The Volkemas had formed concrete, reasonable, *investment-backed expectations* regarding their use of the property, which were completely extinguished by MDNR's actions. There was *no essential nexus* between the state's determination that the 6-acre segment must be used exclusively for wetlands preservation and any burdens arising from the Volkemas' proposed use of their 24.6 acre tract. Finally, the deprivation of all use of a discrete, independently viable segment is qualitatively different from a mere reduction in value of the larger tract and should not be analyzed under the same rule of takings liability.

1. When the State Asserts and Exercises Complete Dominion over a Discrete, Well-Defined Segment of Land, *Lucas*' Categorical Takings Rule Should Be Triggered

Our takings jurisprudence rests in large measure on the recognition that private property rights are inextricably linked with individual liberty and autonomy.[30] As this Court has recognized, property owners suffer a unique injury—regardless of the scale of the government's intrusion—when they are required by state action to "permit another to exercise complete dominion" over a portion of their land.[31] It is this complete loss of dominion that is the gravamen of a categorical taking, regardless of whether the whole or only a part of the landowner's holdings are taken.

In the present case, the State of Michigan has wholly eradicated the Volkemas' autonomous decision-making authority over six acres of their land, and supplanted it with its own. MDNR's actions in classifying the Volkemas' property as wetlands and then denying the permits required to make any beneficial use of the land cut through the Volkemas' entire bundle of ownership rights with respect to that segment. The land can now be used *only* for the purpose the state has dictated—for wetlands preservation.[32] It is the state's exercise of complete dominion

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[30] *See, e.g.*, Roger Pilon, *Property Rights, Takings, and a Free Society*, in *Public Choice and Constitutional Economics* 151, 176 (J. Gwartney & R. Wagner eds, 1988) ("property rights are at the very heart of a free society, serving to define the normative relationships among its members and to enable those individuals to pursue their various ends free from the interference of others").

[31] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

[32] *See* App. B-4; App. D-2.

and control over this six-acre segment that triggers the requirement for just compensation under *Lucas*.

There is a qualitative difference between government regulation that imposes some restriction on property use by "adjusting the benefits and burdens of economic life"[33] and the unilateral exercise of total government control over a productive parcel of private land. There simply is no greater governmental intrusion into the realm of personal liberty and autonomy than when the state confiscates all meaningful decision-making authority in private land for the general public good.

2. A Categorical Taking Should Be Found When Regulations Destroy All Beneficial Use of What Was Previously an Independently Viable Segment of Real Property

One useful test of whether a taking has occurred is to examine whether the segment of land pressed into public service could, prior to the application of the regulations in question, "have been put to at least one economically viable use, independent of the surrounding land segments."[34] This inquiry looks to the uses to which the owner could have put the property in the absence of the regulations to determine whether these uses would have been economically viable in their own right. This avoids bringing ordinary zoning setbacks and buffer zones under the rubric of categorical takings:

> The most obvious example . . . is the property between the edge of a building and the street. In most situations, this buffer zone would be of no economic use to anyone except the owner of the building, and the owner of the building typically would have no economic use for it other than to plant

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[33] *Penn Central*, 438 U.S. at 124.

[34] John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1534, 1557 (1994).

> grass, expand the existing enterprise, or otherwise add value to a larger segment of land. In such a case, it would be inappropriate to consider the buffer zone an independent parcel for regulatory taking purposes, for it has no economic use in and of itself.[35]

The trial court below mistakenly held that MDNR's taking of the Volkemas' six acres was not different in kind from imposing zoning setbacks or buffer zones.[36] The court missed the crucial distinction that such residual strips of land are not ordinarily economically viable in their own right, and thus could not fall within *Lucas*' categorical takings rule.

Instead, the court should have examined the six acres of wetlands "to see if it could have been put to at least one economically viable use independent of the surrounding land prior to the regulation."[37] The record in this case indicates that the segment in question consists of six acres of prime commercial land in a rapidly developing area.[38] This land had an assessed value of some $120,000 in its natural condition,[39] and a 1991 market value in excess of $212,000 if properly graded and filled.[40] Because this six-acre segment would obviously have independent economic viability but for the application of MDNR's regulations and permit denial, it should be subject to *Lucas*' categorical takings rule regardless of the remainder of the Volkemas' holdings.

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[35] John E. Fee, Comment, at 1559.

[36] App. D-3.

[37] John E. Fee, Comment, at 1557.

[38] App. D-1.

[39] App. F-2.

[40] Stipulation of the parties, Michigan Court of Claims No. 91-13914-CM.

3. A Consistent Application of the Takings Clause Should Not Countenance the Complete Extinguishment of an Owner's Reasonable Investment-Backed Expectations Merely Because Other Property Segments Are Also Owned

Applying *Lucas* to the type of taking at issue here would be consistent with the well-recognized importance of protecting reasonable, investment-backed expectations.[41]

> After *Lucas* . . . the Supreme Court may take the position that the "economically viable use" test should be applied to smaller portions of the owner's property. The *Lucas* Court dismissed *Penn Central's* consideration of the owner's other holdings in the area as "unsupportable." It suggested instead that the appropriate unit should be determined by the owner's expectations.[42]

The court below expressly found that the Volkemas "had an investment-backed expectation in the property in question."[43] The Volkemas had invested heavily over the years in constructing and installing roadways, parking facilities, utilities, sewers, and a retention pond for the benefit of the six-acre segment as

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[41] *See, e.g., Penn Central*, 438 U. S. at 124 ("the extent to which the regulation has interfered with distinct investment-backed expectations" an important consideration in determining takings liability); *Lucas*, 505 U. S. at 1034 ("[w]here a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations").

[42] Ann T. Kadlecek, Note, *The Effect of Lucas v. South Carolina Coastal Council on the Law of Regulatory Takings*, 68 Wash. L. Rev. 415, 433 (1993) (footnote omitted).

[43] App. B-4 n.3.

well as the rest of their holdings.[44] The Volkemas' expectations regarding the 6-acre segment were indistinguishable from their expectations of developing the larger 24.6-acre parcel. When MDNR carved out the six acres for dedication to a public use, the Volkemas' admittedly reasonable expectations with respect to that independently viable segment were utterly extinguished. This should be grounds for applying *Lucas'* categorical takings analysis to the loss of all beneficial use of a discrete segment of real property.

4. The Rationale for Finding a Compensable Partial Taking Is Strengthened Where, as Here, There Is No Nexus Between the Regulatory Burden Placed on the Segment Taken and the Owner's Use of the Remainder of the Tract

The trial court below likened MDNR's permit denial to the imposition of "set backs from property lines and other requirements that limit or prohibit the ability of an owner to develop part of their property. These do not constitute a taking since it is recognized that such rules are for the good of all."[45] The kernel of truth in the court's reasoning is that such restrictions do not constitute a taking because they are inextricably connected to the owner's proposed use of the remainder of the property. In this Court's takings parlance, setbacks and comparable limitations bear an *essential nexus*[46] to the placement of buildings and other development activity occurring on the surrounding property. Similarly, certain restrictions on the use of part of a property may be necessitated by health and

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[44] App. F-1-2.

[45] App. D-3.

[46] *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

safety concerns arising from the owner's use of the balance of the estate.[47]

No such nexus exists in the present case. Nothing in the Volkemas' proposed use of their 24 acres of land as a water park would create a burden that could be mitigated by devoting 6 acres to wetlands preservation. The two uses of the Volkemas' property are wholly unrelated. Because of this absence of nexus, the trial court's analogy to zoning setbacks fails. The state's determination that the Volkemas must devote their property to wetlands preservation is wholly gratuitous, motivated solely by the state's desire to press private resources into public use without the inconvenience of paying for them.

5. The Complete Usurpation of an Owner's Rights to the Use of a Discrete Segment of Real Property Is Qualitatively Different from a Mere Reduction in the Value of a Larger Parcel of Which it Is a Part, and Should Not Be Analyzed Under the Same Rule of Takings Liability

In *Lucas*, this Court referred to regulations that would not be classified as takings because they resulted in a "mere diminution in value" of private land.[48] Typically, these cases involve regulatory restrictions that reduce the utility of the owner's entire holdings. Classic examples include *Village of Euclid v. Ambler Realty Co.*[49] (approximately 75% diminution in value due to

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[47] *See Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) (law requiring some coal to be left in pillars upheld in part on grounds that this restriction was necessary to prevent subsidence that would otherwise be caused by owners' extraction of remainder of coal).

[48] 505 U.S. at 1016 n.7.

[49] 272 U.S. 365, 384 (1926).

imposition of zoning ordinance); and *Hadacheck v. Sebastian*[50] (92.5% diminution in value due to ordinance limiting operation of brickyard to certain areas).

The court below characterized the State of Michigan's elimination of all beneficial use of the Volkemas' property as comprising just such a diminution in value, for which compensation is not required.[51] However, this case does not fit within this Court's regulatory diminution decisions. In none of these cases did the government attempt to carve out a discrete portion of the owner's property and require it to be devoted to some public use. The closest analogy would be the decision described as "extreme and unsupportable" in *Lucas*—*Penn Central Transportation Co. v. City of New York*.[52] Yet *Penn Central* did not involve the complete deprivation of beneficial use of *any portion* of the subject property. The owners alleged a taking of the air space over Grand Central Terminal,[53] but the record established that they had not in fact been denied all use of this or any other segment of their property holdings.[54]

Regulations that cause a general decrease in the value of an owner's total holdings are properly subject to the multifacted balancing test of *Penn Central*.[55] Land-use restrictions of this kind are qualitatively different from the complete deprivation of beneficial use of a discrete, independently viable segment of real property. Deprivations of the latter kind, as Judge Sawyer

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[50] 239 U.S. 394, 405 (1915).

[51] App. B-9.

[52] 438 U.S. 104.

[53] *Id.* at 130.

[54] *Id.* at 137.

[55] *Id.* at 123.

pointed out in the dissent below,[56] should be viewed as categorical takings under *Lucas*.

B. When the Government Requires that a Discrete Segment of Private Property Must Be Used for a Public Purpose, Compensation Should Be Required Under *Lucas*

This Court has always exercised special vigilance to ensure compliance with the Takings Clause when the state puts any segment of private property to public use through regulatory enactments or other actions.[57] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[58] this Court found a New York statute to effect a taking because it required an apartment owner to allow a cable television company to place cable equipment on the roof of her building.[59] Although usually classified as a "physical invasion" case, *Loretto* is perhaps better characterized as one in which the state dictated the specific *use* to which a part of Mrs. Loretto's property would have to be devoted. Because the government required the property owner to devote a segment of her property to providing a cable television installation, a compensable taking was found even though this use was imposed on no more than 1.5 cubic feet of space directly above and on the roof of the building.[60]

In the present case, the State of Michigan has imposed an exclusive public use on 6 acres of the Volkemas' property, as opposed to the 1.5 cubic feet in *Loretto*. The courts below

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[56] App. B-9-14 (Sawyer, J., dissenting).

[57] *See, e.g.*, Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1111-30 (1993).

[58] 458 U.S. 419.

[59] *Id.* at 435-40.

[60] *See id.* at 438 n.16.

treated MDNR's actions as a mere restriction on the Volkemas' use of their land, rather than the dedication of this six acres to an exclusively public use.[61] However, it is little more than semantic game playing to argue that the state has not put the Volkemas' property to use for wetlands preservation. As one commentator has noted,

> [w]etlands laws prohibiting all development not only prevent harm, but also take over property in order to exploit some of its use-values for state-dictated service.[62]

Indeed, wetlands preservation is a well-recognized governmental use of property. Land is commonly acquired by government through eminent domain or comparable proceedings and put to precisely the same use that the state has imposed on the Volkemas' property. The only difference is that in this case, the State of Michigan chose not to pay for what it took.[63]

Employing the Volkemas' property for use in wetlands preservation advances policy objectives of the State of Michigan that can be (and are) equally well advanced by purchasing

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[61] App. B-9; App. D-3.

[62] Jed Rubenfeld, *Usings*, 102 Yale L. J. at 1157.

[63] The conservation of natural resources is identified as a "paramount public concern" under the Michigan Constitution, art. 4, § 52. MDNR aggressively pursues this objective through such policies as acquiring private wetlands through reversion to the state for non-payment of taxes. *See* St. Clair Flats Management Plan (April, 1981). The Wetland Protection Act itself provides for the public acquisition of wetlands from private owners—but only if those owners first go to court and obtain a judgment against the state. MICH. COMP. LAWS ANN. Chap. 324 § 30323.

similar parcels of land throughout the state. The government cannot reasonably protest that it only "uses" land for wetlands preservation when it acquires title, whereas imposing this same use on private land without compensation is really a "non-use."

This case is not comparable to *Keystone*, where the government gained no utility from requiring mine owners to forgo the extraction of certain columns of coal. There, the columns were required to alleviate legitimate public health and safety concerns related to the owners' use of the remainder of the property. Here, in contrast, the use of land for wetlands preservation is an independent policy objective of the State of Michigan, unrelated to the Volkemas' use of their property. This policy objective can be pursued either by acquiring land for state management and control, or by imposing state control to direct the use of privately owned land, as has occurred here. In either case, employing land exclusively for wetlands preservation is clearly a public use of that property within the meaning of the Takings Clause.

It should be noted that the Volkemas have no cause to dispute that wetlands preservation is a legitimate, or even laudable, governmental objective. That issue is not before the Court. As Justice Holmes reminds us,

> [t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . .
>
> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[64]

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[64] *Pennsylvania Coal Co. v. Mahon Co.*, 260 U.S. 393, 415-16 (1922).

II

THE DECISION BELOW CONFLICTS WITH OPINIONS OF THE OREGON SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND FEDERAL CIRCUITS IN THEIR TREATMENT OF TAKINGS CLAIMS BROUGHT UNDER THE FIFTH AMENDMENT

The importance of the constitutional question raised by this case is underscored by the existence of deep conflicts on this issue between the states and among the federal circuit courts of appeals. Although the Volkemas' Fifth Amendment takings claim was denied by the Michigan courts, it would have been upheld by the Oregon Supreme Court under that state's interpretation of the federal Constitution. Similarly, if the defendant had been the United States instead of the State of Michigan, the Volkemas would have prevailed in the Federal Circuit Court of Appeals. Other states and circuits are hopelessly divided in their treatment of federal takings claims based on the taking of discrete, well-identified segments comprising less than the entirety of a landowner's holdings. The rights guaranteed to citizens under our Constitution should not depend on the particular state or federal jurisdiction in which they are asserted. This Court should grant the petition to establish uniformity in the treatment of partial takings claims brought under the Fifth Amendment.

A. The Oregon Supreme Court Has Found a Taking Where Environmental Regulations Required that a Discrete Segment of a Larger Tract Be Used for Endangered Species Habitat

In a case strikingly similar on its facts to the one at bar, the Oregon Supreme Court arrived at precisely the opposite conclusion from the court below on the proper application of federal constitutional law. In *Boise Cascade Corporation v.*

Board of Forestry,[65] the state Board of Forestry denied an application to harvest timber on a 64-acre tract to protect an endangered species (the northern spotted owl) that had established its habitat on the plaintiff's property. The board specified an 8-acre segment that could be harvested subject to certain conditions, thereby carving out a 56-acre segment that was deprived of all economically viable use and forced into service as species habitat.[66] The property owner sued, alleging a Fifth Amendment taking of the 56-acre segment.

The Oregon Supreme Court found that the plaintiff had stated a claim for a taking by alleging "depriv[ation] . . . of the only economically viable use of approximately 56 acres of merchantable timber."[67] The court emphasized that it considered the regulated 56 acres to be the relevant parcel for its takings analysis by *denying* a concurrent claim for a temporary taking of the remainder of the 64-acre tract![68]

By focusing its takings analysis on the discrete 56-acre tract that the State of Oregon required to be used as owl habitat, the Oregon Supreme Court (correctly) applied the Takings Clause in a manner completely contrary to the doctrine of the Michigan court below. It is antithetical to our constitutional form of government that rights secured under the Fifth Amendment should be protected in some states but not in others. This petition should be granted so that this Court can establish a uniform interpretation of the Takings Clause for categorical takings of discrete segments of larger tracts of land.

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[65] 935 P.2d 411 (Or. 1997).

[66] *Id.* at 415.

[67] *Id.* at 420 (citing complaint).

[68] *Id.* at 420-21.

B. The Opinion Below Conflicts with the Federal Circuit's Decision in *Loveladies Harbor*

In *Loveladies Harbor, Inc. v. United States*,[69] landowners brought a claim for the regulatory taking of a 12.5-acre segment of a 51-acre parcel. Originally, the 51 acres had been part of a 250-acre tract, most of which had already been developed and sold.[70] When the Army Corps of Engineers denied Loveladies a federal permit needed to develop the 12.5 acres, instead requiring the land to be used for wetlands preservation, Loveladies brought suit against the federal government for just compensation under the Takings Clause.

The Federal Circuit Court of Appeals was directly confronted with the "denominator" issue. The government contended that the relevant property for a takings analysis was either Loveladies' original 250-acre parcel or the 51 acres which it still owned when the permit was denied.[71] Loveladies argued that the denominator of the takings fraction was the 12.5 acres for which it had sought a permit.[72]

The court of appeals agreed with Loveladies, declining to include the impact of the permit denial on the remaining 38.5 acres. The court concluded that "the relevant property for the takings analysis is the 12.5 acres, for which the trial court found the remaining value to be de minimis."[73] Consequently, the court of appeals held Loveladies had been deprived of all economically beneficial use of the "relevant parcel." Thus the

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[69] 28 F.3d 1171 (Fed. Cir. 1994)

[70] *Id.* at 1180.

[71] *Id.*

[72] *Id.* at 1181.

[73] *Id.*

permit denial was "effectively a total taking of the property owners' interest *in these [12.5] acres.*"[74]

The Federal Circuit's focus in *Loveladies* on the property actually carved out for dedication to a public use by the operation of land use regulations, rather than on the owners' entire holdings, stands in stark contrast to the approach of the Michigan courts in the present case. If the plaintiffs in *Loveladies Harbor* had brought their takings claim against MDNR in the Michigan courts, instead of against the Corps of Engineers in the Court of Federal Claims, it is safe to conclude they would have suffered the same fate as the Volkemas.[75]

C. The Decision Below Conflicts with the Ninth Circuit's Decision in *American Savings*

In *American Savings and Loan Association v. County of Marin*,[76] Marin County applied two different zoning classifications to two contiguous segments of a landowner's property. One 48-acre section called Strawberry Spit was zoned as urban open space with a 5-acre minimum lot size. An adjacent 20-acre section known as Strawberry Point was zoned to allow 4 multi-residential units per acre.[77] The point was worth some

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[74] *Id.* at 1182 (emphasis added).

[75] The court below purported to distinguish *Loveladies* on the basis that the property owners had executed deed restriction to the State of New Jersey on the 38.5-acre segment. App B-5. However, this misses the point that the Federal Circuit evaluated Loveladies' takings claim by examining the impact of the government's action on the 12.5-acre segment it had carved out for wetlands preservation, rather than evaluating the 51-acre parcel as an organic whole.

[76] 653 F.2d 364 (9th Cir. 1981).

[77] *Id.* at 367.

$2 million under this zoning arrangement.[78] Nevertheless the owner sued, alleging a regulatory taking of the spit because of the severe zoning restrictions on the 48-acre segment. The trial court held that, since the spit and point were contiguous sections of land under common ownership, the entire 68 acres comprised the relevant parcel for purposes of determining takings liability.[79]

On appeal, the Ninth Circuit recognized that the issue before it was "whether the challenged ordinance creates two separate parcels for taking purposes by adopting different zoning designations for each parcel."[80] The court rejected as inapplicable cases where property was treated as a single unit for takings purposes because in those cases "the entire subject property was covered by a uniform restriction."[81] Instead, the Ninth Circuit noted that this Court in *Nectow v. Cambridge*[82] applied separate constitutional analysis to two contiguous segments of property under common ownership that had been subjected to different zoning.[83]

The Ninth Circuit also agreed with the Oregon Supreme Court's analysis in *Fifth Avenue Corp. v. Washington County*[84] wherein that court "divided the property analytically into two

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[78] *Id.* at 368.

[79] *Id.* at 367.

[80] *Id.* at 370.

[81] *Id.* at 369.

[82] 277 U.S. 183 (1928).

[83] 653 F. 2d at 370.

[84] 581 P.2d 50 (Or. 1978).

parcels" depending on whether they were zoned as developable or not.[85]

Most significantly, the *American Savings* court concluded by holding that if ***the appellant can show that "the Spit and Point have been, or would be, treated separately when its development plans are submitted . . . [then] the spit must be analyzed as a separate parcel for takings purposes."***[86]

This holding clearly conflicts with the treatment of the Volkemas' takings claim by the court below. The Michigan court refused to consider the 6-acre parcel, which had been dedicated for use exclusively as a wetlands preserve, separately from the contiguous 18 acres on which development could occur.[87] Moreover, the court below did not find it significant that the Volkemas had prepared a development plan embodying their investment-backed expectations for their entire 24.6 acres, and the government responded by treating the two segments of property as different entities with respect to their development potential.[88]

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[85] 653 F.2d at 370.

[86] *Id.* at 372 (emphasis added). *Accord, Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990). In deciding to treat different segments of a single legal property as separate parcels for purposes of its takings analysis, the court cited as the "most important" consideration the fact that "the City has treated Queen's Beach separately for zoning and planning purposes. . . . In summary, under the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking." 649 F. Supp. at 947-48.

[87] App. B-7.

[88] *Id.*

It places an unacceptable strain on our constitutional form of government when rights guaranteed under the Fifth Amendment are recognized and protected in some state and federal jurisdictions but not in others. This Court should grant the petition for certiorari to establish that Michigan citizens are entitled to the same rights under the Takings Clause as property owners who bring suit in the courts of the Ninth Circuit, or the Federal Circuit, or the State of Oregon.

CONCLUSION

In *Lucas*, this Court established that a governmental deprivation of all beneficial use of private land categorically triggers the requirement of just compensation under the Takings Clause.[89] In *Loretto* and other decisions, this Court has also applied a categorical takings rule to situations where the government actually puts any discrete segment of private land to public use, even if the affected property is only a small part of the owner's holdings.[90] This case stands at the intersection of these two categorical rules. The State of Michigan has carved out a discrete, well-defined segment of the Volkemas' land and required it to be put to public use as a wetlands preserve. In so doing, the state has also deprived the Volkemas of all beneficial use of this land, which previously had independent economic viability. However, instead of triggering categorical takings liability under either *Lucas* or *Loretto*, the court below found that the state incurred no liability to compensate the Volkemas for the six-acre parcel it had taken.[91]

Other state and federal courts interpret the Fifth Amendment differently on this question. The Volkemas would have prevailed if their claim had been brought in Oregon under

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[89] *Lucas*, 505 U.S. at 1019.

[90] *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426.

[91] App. B-9.

Boise Cascade,[92] or in the Federal Circuit under *Loveladies Harbor*,[93] or in the Ninth Circuit under *American Savings*.[94]

This Court should grant this petition so that it can address the issue of categorical regulatory takings of less than the entirety of a landowner's holdings, an issue the Court raised but left open in *Lucas*. The facts of this case provide an opportunity for this Court to provide much needed guidance to the lower federal and state courts and to establish a uniform base of constitutional protection under the Fifth Amendment. The Volkemas urge this Court to adopt the rule set forth by Judge Sawyer in the dissent below:

> [A] taking occurs where a regulation precludes the use of an identifiable, discrete piece of property, even if that property forms only a portion of a larger parcel.[95]

For these reasons, Petitioners Russell and Lois Volkema respectfully request that this Court grant the petition for writ of certiorari.

DATED: September, 1998.

Respectfully submitted,

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[92] 935 P.2d 411.

[93] 28 F. 3d 1171.

[94] 653 F.2d 364.

[95] App. B-13 (Sawyer, J., dissenting).

Filed 6/9/98
Michigan Supreme Court
Lansing, Michigan

ORDER
Entered: June 9, 1998

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs-Appellants/
Cross-Appellees,

v

SC: 104723
COA: 159820
LC: 91-13914

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,

Defendant-Appellee/
Cross-Appellant.

By order of April 29, 1997, the application for leave to appeal was held in abeyance pending the decision in *K&K Construction, Inc. v. Michigan Dep't of Natural Resources*, (Docket No. 106712).

On order of the Court, the decision having been issued on March 24, 1998, 456 Mich 570 (1998), the application is again considered. The motions to file briefs *amici curiae* are considered and they are GRANTED. The application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The result reached by the Court of Appeals is correct pursuant to this Court's decision in *K&K Construction, Inc., supra*. The Court of Appeals' analysis, particularly its reliance on *Loveladies Harbor, Inc. v. United States*, 28 F 3d 1171 (1994), is disavowed insofar as it is inconsistent with this Court's decision in *K&K Construction*.

The application for leave to appeal as cross-appellant is DENIED as moot.

Appendix A-2

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 9, 1998 /s/ Jacqueline B. McKinna
Deputy Clerk

Appendix B-1

Filed 10/20/95

STATE OF MICHIGAN
COURT OF APPEALS

Russell H. VOLKEMA and
Lois J. Volkema, husband
and wife,

Plaintiffs-Appellants/
Cross-Appellees,

v.

DEPARTMENT OF NATURAL
RESOURCES,

Defendant-Appellee/
Cross-Appellant,

and

Michigan Association of Realtors,

Amicus Curiae.

No. 159820.
LC No. 91-013914-CM

Before NEFF, P.J., and SAWYER and MARKEY, JJ.

NEFF, P.J.

Plaintiffs appeal, and defendant cross appeals, from an order of the circuit court denying plaintiffs relief with respect to their inverse condemnation claim. We affirm.

I

Plaintiffs purchased approximately forty-five acres of commercial property in Kentwood in 1963 and an additional contiguous five-acre parcel in 1979. Plaintiffs made various improvements to the property, sold parcels of the property, and leased a ten-acre parcel to a water park operator. After the sales and lease, 24.6 acres remained, which are the subject of the

present litigation. Plaintiffs sought to have the water park developed on the remaining 24.6 acres in conjunction with the leased ten acres. The water park has a plan that eventually calls for the purchase of the property. However, the 24.6-acre parcel includes some lowlands, which have been classified as protected wetlands under the Wetland Protection Act, M.C.L. § 281.701 *et seq.*; M.S.A. § 18.595(51) *et seq.*, which was enacted in 1980. Defendant denied plaintiffs' request for a permit to fill 4.3 acres of wetlands. Plaintiffs now seek compensation for the six acres they claim are rendered useless by the denial of the fill permit.

The trial court determined that the relevant parcel to consider in determining whether there was a taking is the remaining 24.6-acre parcel. The trial court determined that because only approximately one-quarter of the property was affected, there was no taking.

II

On appeal, the parties present a number of arguments, all of which essentially raise the same issue, namely, whether there was a taking. Because we conclude there was none, we affirm the trial court's decision.

A

1

It is now well-established under constitutional doctrine that a taking of property requiring just compensation may occur if a landowner's property is either physically invaded or regulated "too far." See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Although the Supreme Court has declined to definitively state what "too far" is, two circumstances exist in which compensation is afforded the property owner without a case specific inquiry. *Id.* at 1015, 112 S.Ct. at 2893.

The first category in which compensation is automatically awarded is when the government physically invades a landowner's property. *Id.* This case, however, does not present such a circumstance, and thus any case law or arguments of the parties based on a physical invasion of property are irrelevant to this appeal.

The second distinct category in which compensation is automatically awarded is where a regulation denies all economically beneficial or productive use of one's land. *Id.* In other words, the Fifth Amendment right to just compensation is violated when a land-use regulation either (1) does not substantially advance a legitimate state interest, or (2) denies a landowner all economically viable use of his land in contravention of the property owner's investment-backed expectations.[1] *Id.* at 1016, 112 S.Ct. at 2894.

This is not to suggest that compensation is always awarded. When a land-use regulation merely results in diminution in a property's value, the property owner is not entitled to compensation. *Id.* at 1016, 112 S.Ct. at 2894. The justification for this rule is often stated as being that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [*Id.*]

2

After a review of the parties' appeal and cross appeal, it is apparent that neither party here is arguing that the land-use regulation at issue does not substantially advance a legitimate state interest. Accordingly, we express no opinion with regard

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[1] An exception to this rule exists: a state government may always regulate land pursuant to its common law regarding nuisances. *Id.*

to that matter and assume, for the purposes of this appeal, that the regulation does advance a legitimate state interest.[2]

Thus, the only question that must be answered here is whether plaintiffs were denied all economically viable use of their land. The answer to this question depends on what parcel of land is used to compare plaintiffs' before and after property values.[3] In other words, if we focus only on the six acres that plaintiffs claim were rendered economically useless by the Wetland Protection Act, then plaintiffs have established that they were deprived of all the economically beneficial use of their land. If, however, we use some larger parcel, say the 24.6-acres that encompasses the six acres, or the fifty acres that previously made up all of plaintiffs' property, then all plaintiffs have established is a mere diminution in value, and although they still might be eligible to obtain compensation for the loss, they would fall outside the categorical entitlement to such compensation.[4] See *Lucas*, *supra* at 1019, n. 8, 112 S.Ct. at 2895.

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[2] In presuming the validity of this enactment, we recognize that a broad range of governmental purposes and regulations satisfy the requirement that the laws must advance a legitimate state interest. See *Bevan v. Brandon Twp*, 438 Mich. 385, 398, 475 N.W.2d 37, modified 439 Mich 1202 (1991). We also note that the validity of the Wetland Protection Act is presumed and that, on the basis of the record below, plaintiffs have not met their burden of overcoming this presumption. *Id.*

[3] The record demonstrates that plaintiffs had an investment-backed expectation in the property in question.

[4] Although the Supreme Court's opinion in *Lucas* settled some aspects of takings law, it expressly declined to answer the question before us today, i.e., which parcel should be used as a denominator in regulatory takings causes of actions. *Id.* 505 U.S. at 1016, n. 7, 112 S.Ct. at 2894, n. 7. Thus, we must look elsewhere for the answer to that question.

We have found two cases to be instructive in making this determination.

B

1

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (C.A.Fed.1994),[5] Loveladies originally owned 250 acres of land adjacent to wetlands. In 1972, after Loveladies developed approximately 199 acres, § 404 of the Clean Water Act, 33 U.S.C. § 1344, was enacted, and Loveladies was forced to obtain a permit to fill in the remaining land in accordance with their overall development plan. In the following years, New Jersey, the state in which the land was located, and Loveladies entered into negotiations to allow Loveladies to develop the remaining fifty-one acres. Ultimately, Loveladies agreed to essentially donate 38.5 acres to the state, in order to allow 12.5 acres to be filled and developed. The state accepted this plan.

Unfortunately for Loveladies, the permit process also required obtaining approval from the Army Corps of Engineers. Apparently the corps traditionally follows the state's recommendation, and, although New Jersey had previously granted the state permit, it recommended to the corps that it deny the federal permit. The corps followed New Jersey's recommendation. *Id.* at 1174.

Loveladies sued the United States, claiming that a compensable regulatory taking had occurred because it was denied all economically feasible use of the 12.5 acres of land. The United States disagreed, arguing that Loveladies merely suffered a diminution in its property's value, comparing the 12.5

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[5] The court's opinion in *Loveladies*, in concise yet complete detail, lays out the history of the law of regulatory takings and successfully puts into perspective the effects of *Lucas* on the development of the law in this area. The court in *Loveladies* then specifically addresses the issue presented here and brings that issue into sharp, clear focus.

acres with either the original 250 acres, or the fifty-one acres remaining after the 1972 amendment in the law. Thus, as here, one of the main issues before the court was how much of Loveladies' land to use as a comparison to the affected parcel to determine the extent of Loveladies' loss. Otherwise stated, the court in *Loveladies* was called on to determine the denominator parcel.[6] *Id.* at 1179.

The court of appeals began its discussion by eschewing any bright-line test to determine the denominator parcel and instead held that a flexible approach designed to account for factual nuances of each individual case should be used. *Loveladies*, *supra* at 1181.

The court then examined the factual nuances of the case before it and held that the 199 acres that had been developed before the enactment of § 404 of the Clean Water Act should not be considered as part of the denominator because no effort had been made by the state to regulate that land. *Id.* The court then determined that the 38.5 acres that had, in essence, been dedicated to the state should not be part of the denominator because it had no value to Loveladies. *Id.* Thus, the court was left with the 12.5 acres of land affected by the corp's permit denial. Because the court found the remaining value to be so small as to be useless, it concluded that Loveladies was denied all economically viable use of the property, thus entitling it to compensation under *Lucas*, *supra*.

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[6] The court in *Loveladies*, cited *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), in which the Court defined the "denominator parcel" in the following manner:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction. *Loveladies*, *supra* at 1180 n. 13.

Here, employing a similar analysis, we conclude that the denominator should not consist of the entire forty-five acres originally owned by plaintiffs because approximately half of that land already had been developed before the enactment of the Wetland Protection Act.

Examining the remaining 24.6 acres, we see no reason to exclude some eighteen acres of that land as part of the denominator in determining plaintiffs' loss. This case is in stark contrast with *Loveladies*, *supra*, to the extent the court in *Loveladies* determined that only the affected 12.5 acres in question had value to Loveladies. Here, the entire 24.6 acres is admittedly of high value to the plaintiffs. In other words, although plaintiffs lost the use of approximately six acres of the remaining 24.6-acre parcel, the land, when viewed as a whole, continues to have substantial value and may still be used in the manner intended by plaintiffs, i.e., it may be developed for commercial purposes.

Accordingly, the trial court properly concluded that plaintiffs' loss should be considered in light of the 24.6 acres, not merely the affected six acres.

C

Bevan v. Brandon Twp., 438 Mich. 385, 475 N.W.2d 37, modified 439 Mich 1202 (1991), also supports our conclusion here. In *Bevan*, the plaintiffs owned two parcels of lakefront property but were restricted by a zoning ordinance to being able to develop only one house on the two parcels. Although the plaintiffs argued that because of the restriction they were denied all economically feasible use of one of the parcels, our Supreme Court disagreed, holding that both of the parcels must be examined as a whole to determine the plaintiffs' loss. *Id.* at 396-397, 475 N.W.2d 37.

The Court relied on two United States Supreme Court opinions, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978),[7] to support its ultimate conclusion that when determining whether a taking has occurred, the "plaintiffs' land, and the full bundle of property rights associated with it, must be viewed in its entirety," *Bevan*, *supra* 438 Mich. at 397, 475 N.W.2d 37.

D

Accordingly, on the basis of squarely applicable precedent of the Supreme Courts of both the United States and Michigan, we conclude that the trial court properly considered the panoply of plaintiffs' remaining property rights, rather than merely a portion of those rights, in determining the extent of the Wetland Protection Act's effect on plaintiffs' property. In other words, the court correctly used the 24.6-acre parcel as the denominator in determining the extent of plaintiffs' loss.

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[7] With regard to *Penn Central*, the United States Supreme Court in *Lucas*, *supra*, suggested that New York's determination that all of Penn Central's holdings in the area could be used as the denominator was unsupportable. The Court in *Penn Central*, however, did not rely on that determination. Instead, the Court focused on the property in question and the alleged total loss of airspace rights when it stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. [438 U.S. at 130.]

Thus, while it may be argued that the extent of New York's decision in *Penn Central* was unsupportable, it cannot be gainsaid that the Supreme Court approved the concept of viewing an affected property as a whole. We conclude it would be contrary to the holding in *Penn Central* to extract portions of a property and examine those portions piecemeal when determining the effect of a land-use regulation on the property.

E

We also conclude that the trial court did not err in determining that plaintiffs were not entitled to compensation for the diminution in the value of their property. See *Lucas*, *supra* 505 U.S. at 1019, 112 S.Ct. at 2895, n. 8. Plaintiffs have failed to show that their property either is unsuitable for use because of the Wetland Protection Act or is now unmarketable. *Bevan*, *supra* 438 Mich. at 403, 475 N.W.2d 37. Indeed, as plaintiffs acknowledge, their land, even as regulated, is still worth more than $600,000, and the majority of it may still be developed for commercial purposes. Accordingly, we find no error in this aspect of the trial court's conclusion.

III

In sum, we conclude that the trial court properly determined the extent of plaintiffs' loss by considering how the land-use regulation in question affected plaintiffs' rights to their property as a whole, rather than by examining the effect of the regulation on only the affected six acres. Employing this analysis, we also agree with the trial court that the mere diminution in the value of plaintiff's property is not compensable.

Affirmed.

/s/ Janet T. Neff
/s/ Jane E. Markey

SAWYER, J (dissenting).

I respectfully dissent.

The majority correctly looks to the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), for guidance. However, the majority fails to appreciate the ramifications of the *Lucas* decision.

In *Lucas*, the Supreme Court reiterated the rule that where regulation denies all economically beneficial or productive use of land, a taking occurs and the owner is entitled to compensation. *Id.* at 1015, 112 S.Ct. at 2893. The *Lucas* Court found a taking where a state statute prohibited building on the plaintiff's beach-front property. The instant dispute involves the question raised, but not directly answered, in *Lucas*, namely, whether all the economic use of all of plaintiffs' property must be deprived by the regulation before there is a taking or whether it is sufficient that a portion of plaintiffs' parcel is denied all of its beneficial use because of the taking.[1] The Court commented on this question in *Lucas*, *id.* at 1016, n. 7, 112 S.Ct. at 2894, n.7:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme--and, we think, unsupportable--view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 NY2d 324, 333-334; 366 NE2d 1271, 1276-1277 (1977), aff'd 438 US 104 [98 S.Ct. 2646, 57 L.Ed.2d

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[1] This appears to be the basis of the dispute between the parties concerning whether the remaining 24.6-acre parcel should be considered or whether the original fifty-acre parcel should be considered in analyzing whether there was a taking. However, it is not relevant which of those two parcels is viewed. Rather, the focus is on the 4.6-acre parcel that forms the subject of the regulation.

> 631] (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

While the Supreme Court was able to avoid the question in *Lucas* because it was undisputed that *Lucas* was denied the beneficial use of all of his property by the regulatory taking, that question cannot be avoided in the case at bar. If either the remaining 24.6-acre parcel or the original fifty-acre parcel is viewed as a whole, then it is clear that plaintiffs have not been denied all economic use of their property because the property is usable with the exception of approximately 4.3 to 6 acres of wetlands and surrounding area. On the other hand, if we focus on the wetland parcel itself, plaintiffs are denied the economic use of that property inasmuch as the denial of the fill permit precludes them from developing and making use of that parcel.

In reaching its decision, the majority finds support in *Bevan v. Brandon Twp*, 438 Mich. 385, 475 N.W.2d 37 (1991). In *Bevan*, our Supreme Court concluded that there was no taking where a zoning ordinance had the effect of allowing the property owner to build only one house on two contiguous lots.[2] Our Supreme Court concluded that in determining whether a taking existed, the property must be viewed as a whole. *Id.* at 397, 475 N.W.2d 37. However, I do not believe that *Bevan* is controlling for two reasons.

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[2] The reason for the restriction was that the property was accessible only by an easement that was twenty feet wide while a zoning ordinance required a road with a right of way of sixty-six feet in width if it was servicing two or more houses.

First, the Michigan Supreme Court's decision in *Bevan* was rendered before the United States Supreme Court's decision in *Lucas*. Accordingly, there is a question whether *Bevan* remains good law. The viability of the decision in *Bevan*, moreover, is additionally questionable because of *Bevan's* strong reliance on the United States Supreme Court's decision in *Penn Central*, *supra*. Indeed, the Michigan Supreme Court directly cites *Penn Central* in support of the proposition that the property must be viewed as a whole. However, when the United States Supreme Court decided *Lucas* the following year, it disavowed that view expressed in *Penn Central*, declaring that view to be "extreme" and "unsupportable." 505 U.S. 1016, n. 7, 112 S.Ct. at 2894, n. 7.

Moreover, even if we were to defer to the Supreme Court to address the question of the continuing viability of *Bevan* in light of *Lucas*, I do not believe that *Bevan* is relevant to the disposition of the case at bar. In *Bevan*, the property owner was not denied the beneficial use of all of his property, or even a portion of his property. Rather, he merely was restricted with respect to the extent to which he could use and develop the property. That is, unlike the case at bar, the property owner in *Bevan* could build a single-family detached house, the intended use of the lots, anywhere he wanted on either of the lots involved. He merely was precluded from building two houses, one on each lot, as he had intended. Therefore, the property owner was able to use all of his property, though not in the manner he desired. In the case at bar, however, the property owner enjoys no such freedom. The effect of the Wetland Protection Act, M.C.L. § 281.701 *et seq.*; M.S.A. § 18.595(51) *et seq.*, and of defendant's denial of a fill permit is to preclude utterly the use of a portion of plaintiffs' property. Plaintiffs are not free to choose what portion of their property to develop. Rather, the regulation allows development of a specific portion of the property and absolutely precludes the development of another portion of the property.

The majority's strong reliance on *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (C.A.Fed.1994), is somewhat mystifying inasmuch as that court ruled in favor of the property owner. Ultimately, like *Lucas*, it avoided a clear determination on partial takings, concluding that a full taking had occurred. *Loveladies*, *supra* at 1182.

In sum, where there is a mere restriction on the extent of use of property, as was the case in *Bevan*, there is no taking. However, where a property owner is prohibited from making use of his property, or even a portion of the property, then there is a taking with respect to the identifiable portion which cannot be used. In short, in light of the strong historical protection of private property in this country and the constitutional mandate that the government may put private property to public use only after compensating the owner of that property, I believe that the question posed in *Lucas* is best answered by concluding that a taking occurs where a regulation precludes the use of an identifiable, discreet piece of property, even if that property forms only a portion of a larger parcel. I do not find it relevant how large a portion of property the owner possesses. What is relevant is that the government has determined that a public purpose would be served by denying the rightful owner of the property the use of that property and requiring it to be used, or in this case not used, in accordance with that public purpose. While the government is permitted to do this, it must compensate the property owner for putting the property to public use. Our historical protection of private property in the constitution allows no less.[3]

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[3] It should be noted that the conclusion that there is a taking does not necessarily compel the conclusion that there must always be compensation. Compensation is, of course, required for the value taken. If the property is utterly worthless, then there is no value taken and no need for compensation. Similarly, if the cost of filling the property and rehabilitating it to the point that it can be developed

(continued...)

For the above reasons, I would conclude that the trial court erred in determining that there was no taking. Rather, the trial court should have determined that a taking occurred by the denial of the fill permit under the Wetland Protection Act and should have proceeded to determine the amount, if any, of compensation due plaintiffs.

/s/ David H. Sawyer

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[3] (...continued)
would exceed the value of the property once it is rehabilitated, then nothing of value is taken. However, we are not called upon in this appeal to address the issue of the amount of compensation, rather only whether there was a taking. I would conclude that there was a taking, but leave it for the trial court to determine the amount, if any, of compensation that is due.

Filed 12/23/92

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs,

v

File No. 91-13914-CM
HONORABLE
WILLIAM E. COLLETTE

STATE OF MICHIGAN; THE DEPARTMENT OF NATURAL RESOURCES, and ROLAND HARMES, Director of the Department of Natural Resources,

Defendants.

JUDGMENT

At a session of court, held in Lansing,
Michigan on December 23, 1992.

This action was commenced with the filing of a Complaint on October 29, 1991. In an Opinion and Order dated June 18, 1992, the court denied plaintiffs' Motion for Summary Judgment or Alternative Partial Summary Disposition. In an Opinion and Order dated September 29, 1992, the court denied plaintiffs' Second Motion for Summary Judgment or Partial Summary Disposition, denied defendants' Motion for Summary Disposition as to Count I and granted Defendants' Motion for Summary Disposition as to Count II. Trial was held on November 9, 1992. In an Opinion and Order dated December 10, 1992, the court determined that defendants' denial of a permit pursuant to the Goemaere-Anderson Wetland

Protection Act did not constitute an unconstitutional taking of plaintiffs' property.

WHEREFORE, for reasons set forth in this court's Opinion and Orders dated June 18, September 29, and November 9, 1992,

IT IS ORDERED, judgement of no cause of action is entered in defendants' favor.

/s/ William E. Collette
William E. Collette
Circuit Judge

Approved for entry
pursuant to MRC 2.602(B)(2)

/s/ Russell H. Volkema
Russell H. Volkema
Attorney for Plaintiffs

/s/ Kevin T. Smith
Kevin T. Smith
Assistant Attorney General
Attorney for Defendants

Appendix D-1

Filed 12/10/92

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs,

v.

File No. 91-13914-CM

Hon. William E. Collette

OPINION AND ORDER

STATE OF MICHIGAN, THE
DEPARTMENT OF NATURAL
RESOURCES, and ROLAND
HARMES, Director of Department
of Natural Resources,

Defendants.

FACTS

Russell H. Volkema and Louise T. Volkema are the owners of a 24.6 acre parcel of property located in the City of Kentwood, Kent County, Michigan. This parcel is zoned commercial and runs along 28th Street, a prime commercial development area.

A 4.6 acre piece of the property has been determined to be a protected wetland under the Goemaere-Anderson Wetland Protection Act. MCLA Section 281.701, *et seq*. In order to "square off" the boundaries of the protected property, another 1.4 acres of Plaintiffs' property is also unusable.

This Court has previously addressed several issues in this lawsuit in two opinions on file. Those two opinions are incorporated herein.

OPINION

In view of this Court's previous rulings, the only issue remaining to be determined is whether the application of the Wetland Protection Act to Plaintiff's property has destroyed the economic value of Plaintiffs' property or interfered unreasonably with Plaintiffs' investment-backed expectations. *Loveladies Harbor, Inc. v. US*, 31 ERC 1848 (1990).

During the trial, it was shown that the 4.6 acre wetland is confined to one side of the property. Commercial development has occurred in a portion of the balance of the property by the construction of a parking lot and such development is planned and feasible for the balance of the non-wetland areas of the parcel. The testimony demonstrated that the non-wetlands have a commercial value of $35,000 to $40,000 per acre. Plaintiffs have argued that the wetlands have a negative impact on the other property because of the taxes paid on them, because mosquitos breed there, and because they are unsightly. This Court notes that property taxes on lands determined to be wetlands are to be reduced accordingly to reflect the obvious impact on value. Further, mosquitos breed all over the state of Michigan and wetlands, while unsightly to some, have an intrinsic beauty in the eyes of other beholders. In this Court's opinion, where the balance of this parcel has a value in excess of $600,000, it cannot be said that the economic impact is such as to constitute a taking.

During argument in this case, Plaintiffs continued to rely on the theory that, since they are prohibited from any commercial development of the six-acre area, a taking has occurred. They contend this Court must ignore the value of the balance of

the property. In support of this view, Plaintiffs have cited *Lucas v. South Carolina Coastal Council*, 112 S Ct 2886 (1992).

However, *Lucas* is distinguishable on its facts. There the regulation prohibited *any* use or development of the entire parcel of property owned by the plaintiff. Here, only a quarter of the total parcel is restricted and the balance has a value in excess of $600,000. As this Court has noted before, zoning regulations often require set backs from property lines and other requirements that limit or prohibit the ability of an owner to develop part of their property. These do not constitute a taking since it is recognized that such rules are for the good of all. Only where the regulation amounts to a confiscation or a total denial of use does it constitute a taking. In this case, most of the economic value of the 24.6 acre parcel remains. This Court finds for the Defendants.

Defendants shall prepare and file an appropriate order.

Dated 12/10/92

/s/ William E. Collette
William E. Collette, Circuit Judge

Appendix E-1

Filed 9/29/92

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs,

v

STATE OF MICHIGAN, THE
DEPARTMENT OF NATURAL
RESOURCES, and ROLAND
HARMES, Director of Department
of Natural Resources,

Defendants.

File No. 91-13914-CM
Hon. William E. Collette
OPINION AND ORDER

This matter is before the Court on Plaintiffs' Second Motion for Summary Judgment, or Partial Summary Disposition and Defendants' Motion for Summary Disposition, both based on MCR 2.116(C)(10). This Court, having read the motions, responses, briefs, and related filings, having heard oral argument of the parties, and being fully advised in the premises, makes the following determinations:

FACTS

The Court incorporates herein the facts set forth in its Opinion and Order dated June 18, 1992.

In its June 18, 1992, Opinion and Order, the Court held that for purposes of the taking analysis, the whole of the parcel is determined to be 24.6 acres. Subsequently, the parties filed cross-motions for summary disposition.

Even though the Court has previously determined that for purposes of a taking analysis the whole of the parcel is determined to be 24.6 acres, Plaintiffs' motion argues once again that the Defendants' actions have affected a taking of the six acres. Plaintiffs further argue that the six acres of wetland carries with it a heavy property tax burden which gives the entire 24.6 acre parcel a negative value. As evidence of its negative value, Plaintiffs attach tax bills and the Affidavit of Carl Fink, President of a general partner of a limited partnership, which owns the water park adjacent to the 24.6 acres of Plaintiffs' property. The Affidavit states that the partnership has an interest in purchasing the 24.6 acreage except for the wetland acreage, and further states that the property tax on the wetland acreage creates a negative value on the entire 24.6 acres.

Defendant argues that Plaintiffs have not lost any compensable property right as a result of the denial, that there is no taking because regulation of the wetland is a valid exercise of the state's police power, and that the permit denial does not involve an actual invasion of Plaintiffs' property, does not deny Plaintiffs all economically beneficial or productive use of their property, and does not go so far in restricting Plaintiffs' use as to constitute a taking. Defendant further argues that the Uniform Condemnation Procedures Act is not applicable to inverse condemnation or takings claims.

DISCUSSION

Plaintiffs continue to argue that this Court should only consider the six acres for purposes of the taking analysis. Plaintiffs argue that the Court should follow *Loveladies Harbor, Inc. v. US*, 15 Cl Ct 381 (1988). This issue was previously decided in the Court's Opinion and Order dated June 18, 1992, wherein the Court determined that 24.6 acres was the proper consideration for the taking analysis. This Court notes that in *Loveladies Harbor, Inc., supra*, the reason the court defined the whole parcel as 12.5 acres and not 51 acres is because some of that property was not contiguous, and because the possibility of

obtaining a permit for the remaining property was an impossibility. Therefore, it also was almost certainly as equally valueless as the 12.5 acres, making any inquiry into the regulations' economic impact and its interference with reasonable investment backed expectations on the 51 acres, a fruitless endeavor.

Having laid that issue to rest, the Court can address the core issue in these motions: Whether there is a genuine issue of material fact as to whether or not there has been a taking. This court determines that there remain genuine issues of material fact to be determined at trial.

As noted in this Court's earlier opinion, the Supreme Court has characterized the taking analysis as one where ad hoc, factual inquires into the circumstances of each case must be made. *Penn Central Transportation Co v. New York*, 438 US 104, 130-131; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

The Court agrees with Plaintiffs that *Loveladies Harbor, Inc. v. US*, 31 ERC 1848 (1990) set forth the applicable law. The Court in *Loveladies* recognized that Courts look to several issues in determining whether a taking has occurred.

> First, a taking can occur where the imposition of a government regulation fails to substantially advance a legitimate governmental interest . . . Second, a taking can occur where the imposition of a governmental regulation has the effect of depriving the owner's land of all economic value. (citations omitted).

Loveladies Harbor, Inc. v. US, 15 Cl Ct 381 (1988). The first issue is not challenged in this case. In order to analyze the second issue, whether a government regulation has deprived an owner of the economic value of his land, three factors have been utilized:

1) the character of the governmental action;

2) the economic impact of the regulation on the claimant;

and

3) the extent to which the regulation has interfered with reasonable investment-backed expectations.

Loveladies, *supra*, at 391, citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 US 470, 495; 107 S Ct 1232, 1247; 94 L Ed 2d 472 (1987).

In the first factor, the court must determine whether the act closely parallels an act of eminent domain. The central inquiry is "whether the act is equivalent to the physical invasion or destruction of substantial rights held in the property." *Loveladies Harbor, Inc.*, *supra*. As in *Loveladies*, the Plaintiffs have not been directly hindered in their rights to possess, dispose, and exclude others. Therefore, as in *Loveladies*, this Court finds that this case is not the equivalent of any destruction or intrusion attendant with an act of eminent domain.

In order to properly evaluate the second and third factors, the court must compare the value of property before and after the regulation's interference. This involves comparing the differing fair market values of the property. *Loveladies*, *supra* at 391.

The only evidence provided by Plaintiff of the fair market value of the property after the regulation is Mr. Fink's Affidavit. The Affidavit, however, states that the general partners of Water Park of Michigan Limited Partnership wish to purchase the property and that the wetland area has a negative value effect on the total parcel. This is not sufficient evidence of fair market value. Defendants provide absolutely no evidence of fair market value. As such, this Court is unable to properly determine the economic impact of the regulation, if any, and its interference with reasonable investment-backed expectations, if any. Therefore, based upon the foregoing, Plaintiffs' Motion for

Summary Disposition is denied, and Defendants' Motion for Summary Disposition, as it applies to these issues, is also denied.

Defendants also argue that Plaintiffs should not be compensated because the regulation prevents a harmful use and that Plaintiffs should not be compensated because there is a valid application of the State's police power. The Supreme Court rejected these arguments in *Pennsylvania Coal Co. v. Mahon*, 260 US 393; 43 S Ct 158; 67 L Ed 2d 322 (1922), and more recently in *Lucas v. South Carolina Coastal Council*, __ US __; 112 S Ct 2886; __ L Ed 2d __ (1992). Therefore, Defendants' Motion for Summary Disposition on these issues is denied.

Finally, Defendants argue that the Uniform Condemnation Act, MCL 213.50, has no application to inverse condemnation actions, and therefore Count II of Plaintiffs' Complaint should be dismissed. The Court agrees. The law is well settled that the Act is not applicable to inverse condemnation proceedings. *Jack Loeks Theatres, Inc. v. City of Kentwood*, 189 Mich App 603, 616 (1992) lv den. 439 Mich 962 (1992).

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Disposition is DENIED, and Defendants' Motion for Summary Disposition is DENIED as to Count I and GRANTED as to Count II.

Dated: Sept 29, 1992

/s/ William E. Collette
William E. Collette
Circuit Judge

(2)

FILED
NOV 3 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-388
In the Supreme Court of the United States
October Term, 1998

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA,

Petitioners,

v.

STATE OF MICHIGAN;
DEPARTMENT OF ENVIRONMENTAL
QUALITY, and RUSSELL HARDING,
Director of Department of Environmental Quality,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

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25 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

When a property owner is denied a permit to fill 4.3 acres of wetland does the Constitution require a court to focus only on the 6 acres which allegedly cannot be commercially developed due to that decision in determining whether a taking has occurred or, consistent with longstanding takings jurisprudence, should the court consider the entire undeveloped 24.6 acre parcel of property currently owned by the property owner?

LIST OF PARTIES

In the courts below, the State of Michigan, the Michigan Department of Natural Resources (MDNR) and its Director, Roland Harmes, were listed as respondents. In 1995 the Michigan Department of Environmental Quality (MDEQ) was created and assumed the obligations and authority for the regulatory scheme under which the permit decision at issue was rendered. Executive Reorganization Order 1995-18, Mich Comp. Laws Ann. § 324.99903 (West Supp. 1998). Russell J. Harding has succeeded Roland Harmes as MDEQ's Director. Director Harding and the Michigan Department of Environmental Quality are automatically substituted as parties. Supreme Court Rule 3.5.3. All three respondents will be collectively referred to as "MDEQ."

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OPINIONS BELOW

Petitioners' Application for Leave to Appeal to the Michigan Supreme Court was denied in an Order dated June 9, 1998. *Volkema v. Department of Natural Resources*, 457 Mich. 884 (1998). The application for leave to appeal had been held in abeyance pending the Michigan Supreme Court's decision in *K & K Construction v. Department of Natural Resources*, 456 Mich. 570; 575 N.W.2d 531 (1998), *cert. den.* ___ U.S. ___ (1998).

The Michigan Court of Appeals decision in the underlying case is reported as *Volkema v. Department of Natural Resources*, 214 Mich. App. 66; 542 N.W.2d 282 (1995). The various state Court of Claims opinions are not published.

The pertinent orders and opinions are reproduced as Appendices A-E to the Petition.[1] Respondents have not attached these documents to this brief and will reference Petitioners' Appendices as required.

JURISDICTION

Respondents do not dispute Petitioners' statement concerning the jurisdiction of the Court.

STATEMENT OF THE CASE

Respondents, the State of Michigan, the Michigan Department of Environmental Quality and Russell Harding, Director of the Michigan Department of Environmental Quality ("MDEQ"), will primarily rely on the recitation of facts contained in the Michigan Court of Appeals opinion in the underlying case. 214 Mich. App. at 66-67; Petitioners' Appendix B, pp. 1-2. This concise, two- paragraph narration adequately presents the factual background in this case for purposes of addressing the issue raised by Petitioners.

However, two areas of potential confusion should be clarified. The first involves the nature of the government action at issue which, contrary to Petitioners' rhetoric, was

[1] Petitioners cite to an "Appendix F" in their Petition. However, there was no Appendix F appended to Respondents' copy of the Petition.

solely the denial of Petitioners' permit application to fill an area of wetland under the former Goemaere-Anderson Wetland Protection Act ("WPA"), Mich. Comp. Laws Ann. § 281.701 *et seq* (West 1979),[2] for purposes of a proposed commercial development. Trial Exhibits E and F; Petitioners' Appendix B, p. 2. Nothing in the government's decision on that application requires that Petitioners allow the government or the general public to enter their property, that they take any affirmative action to maintain the wetland, or that they utilize the property in any particular way. Petitioners' persistent characterization of the government action in this matter as requiring that a portion of their property be "pressed into public use or service," "devoted exclusively to public use" or "dedicated for use exclusively as a wetlands preserve" (*see, e.g.*, Petition, pp. 4, 5, 6, 16, 19, 25, and 26), raises the specter of permanent government invasion, public easements, or affirmative deed restrictions none of which occurred in this case.

Additionally, the Court of Appeals statement that, "approximately half of that land [Petitioners' 50 acres of property] already had been developed before the enactment of the Wetland Protection Act"[3] is erroneous. The WPA was enacted in 1979 and became effective in October of 1980. The testimony of Mr. Volkema at trial established that 26 of the 50 acres were sold between August of 1981 and August of 1987, in four separate transactions, for a total of $1.987 million. November 9, 1992 Trial Transcript, pp. 21-24. On the basis of this erroneous determination, the Court of Appeals excluded the 26 acres from its takings analysis.[4] The MDEQ cross-appealed in the Court of Appeals and sought application for leave to appeal as a cross-appellant in the Supreme Court in order to challenge the lower courts' exclusion of the 26 acres of the original 50 acre parcel owned by the Volkemas in determining the relevant parcel. The application for leave to

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[2] The Wetland Protection Act has since been recodified as Part 303 of the Natural Resources and Environmental Protection Act ("NREPA"), Mich. Comp. Laws Ann. § 324.30301 *et seq* (West Supp. 1998) without substantive change.

[3] 214 Mich. App. at 73-74; Petitioners' Appendix B-7.

[4] The trial court had also excluded the 26 acres without detailed explanation. June 18, 1992 Opinion and Order.

appeal as cross-appellant was denied by the Michigan Supreme Court in the same order denying petitioners' application. Petitioners' Appendix A-1.

REASONS FOR DENYING THE WRIT

I.

BECAUSE OF ITS UNIQUE FACTS AND PROCEDURAL POSTURE THIS IS AN INAPPROPRIATE CASE TO RESOLVE THE QUESTION RAISED IN THE PETITION.

MDEQ wishes to highlight an important aspect of the procedural background in this matter not fully addressed by Petitioners. Petitioners purport to be seeking issuance of a writ of certiorari to review the Michigan Court of Appeals decision in this case. Specifically, Petitioners seek review of the opinion as it concerns the determination of the relevant parcel in a regulatory takings case. Petition, p. 1. However, the Michigan Court of Appeals opinion is not the controlling authority on that issue in the State of Michigan. Rather, the test to be applied by the courts in Michigan is governed by the Michigan Supreme Court's opinion in *K & K Construction, supra*.[5] The Order of the Michigan Supreme Court disposing of Petitioners' Application for Leave to Appeal in the underlying case makes it clear that the analysis of the Michigan Court of Appeals is not controlling to the extent it is inconsistent with *K & K Construction*:

> The application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The result reached by the Court of Appeals is correct pursuant to this Court's decision in *K & K Construction, Inc., supra*. The Court of Appeals' analysis, particularly its reliance on *Loveladies Harbor, Inc. v. United*

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[5] The Petition for a Writ of Certiorari in *K & K Construction, Inc. v. Department of Natural Resources and Michigan*, No. 97-1957, was recently denied by this Court in an order dated October 5, 1998. That Petition, also authored by the Pacific Legal Foundation, similarly sought to have this Court address the relevant parcel issue.

States, 28 F 3d 1171 (1994), is disavowed insofar as it is inconsistent with this Court's decision in *K & K Construction*.[6]

Petitioners seek to have this Court review the decision of the Michigan Court of Appeals for the purpose of arguing for the adoption of a new "partial categorical taking" rule, Petition, p. 7, but this case is an inappropriate vehicle for exploring any such new principle for several reasons. First, the Michigan Supreme Court has severely limited any precedential authority of the Court of Appeals opinion by expressly disavowing, at least in part, its analysis. Petitioners are seeking review of a result, not a rationale. Second, Petitioners rely on a dissenting opinion in the Michigan Court of Appeals. Petition, p. 27. Third, Petitioners have failed to demonstrate any tenable legal authority or policy basis for the new "per se" rule they advocate. Fourth, the alleged conflicts between opinions they rely upon are illusory. The petition should be denied.

II.

THE DECISION OF THE MICHIGAN COURT OF APPEALS IS CONSISTENT WITH ESTABLISHED PRECEDENT OF THIS COURT, AS WELL AS THE LOWER FEDERAL COURTS.

Petitioners essentially acknowledge that the rule they propose is not supported by existing legal authority. Petition, p. 27. The rule Petitioners would have this Court adopt is the view of the dissenting judge in the Michigan Court of Appeals below that, "[A] taking occurs where a regulation precludes the use of an identifiable, discrete piece of property, even if that property forms only a portion of a larger parcel." 214 Mich. App. at 80; Petitioners' Appendix B-13. Such a rule would represent a radical departure from this Court's established takings jurisprudence and would fundamentally alter the playing field for regulators and private parties. By comparison, the decision of the Court of Appeals represents a

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6 457 Mich. 884; Petitioners' Appendix A.

"mainstream" analysis of the relevant parcel issue[7] which is consistent with a long line of decisions from this Court and the emerging rule in the lower federal courts.

A. The Court Of Appeals Decision To Not Limit Its Analysis To The Discrete Portion Of The Property Impacted By The Government Action Is Consistent With This Court's Longstanding Precedent.

The genesis of the modern "parcel-as-a-whole" or "non-segmentation" doctrine is *Penn Central Transportation Co. v New York City*, 438 U.S. 104 (1978), wherein this Court dismissed the argument that the "air rights" impacted by a landmarks ordinance were taken "irrespective of the value of the remainder of their parcel. . . ." 438 U.S. at 130. Instead this Court held that "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id. See also, Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed as a whole").

To the extent there was any ambiguity concerning the scope of this rule, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), this Court made it clear that even if it was alleged that discrete portions of a claimant's property were taken in their entirety, as opposed to "strands" or rights in a piece of property, the focus would still not be limited to the impacted areas. 480 U.S. at 498-502. In *Keystone*, an identifiable 27 million tons of coal were required to be left in place as a result of Pennsylvania's Subsidence Act and, consequently, would have no value to the claimant. *Id.* at 498. The claimants accordingly sought to "narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use." *Id.* at 496. In rejecting this strategy, the Court made it clear that this rule did not simply apply to vertical rights in

[7] As discussed, *supra*, MDEQ believes the entire 50-acre parcel, which was still undeveloped when the WPA was enacted, should have been included in the relevant parcel.

land, *e.g.*, air or mineral rights, but also applied horizontally: Many zoning ordinances place limits on the property owner's right to make profitable use of *some segments of his property*. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because *the footage represents a distinct segment of property* for takings law purposes.[8]

Petitioners assert that the language in footnote 7 of the opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),[9] opened the door to revision of the rule established in *Penn Central* and *Keystone*. Petition, pp. 6 and 27. However, whatever may have been the import of that language, this Court has not subsequently indicated that it was prepared to contemplate a rule such as that proposed by Petitioners. To the contrary, in *Concrete Pipe and Products of California Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993), the Court emphatically disavowed any intention to adopt such a rule:

> [W]e rejected this analysis years ago in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-131 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. *To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.*[10]

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[8] 480 U.S. at 498 (emphasis added).

[9] 505 U.S. at 1016 n. 7.

[10] Emphasis added.

Moreover, in a case involving the required dedication of a portion of real property to the government, *Dolan v Tigard*, 512 U.S. 374, 384 n. 5 (1994), this Court, citing *Lucas*, opined, "There can be no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive *some* economic use from her property." (Emphasis in the original).

B. Lower Federal Courts Which Have Addressed The Relevant Parcel Issue Have Reached Conclusions Consistent With The Michigan Court Of Appeals And Have Expressly Rejected The Type Of "Per Se" Rule Advocated By Petitioners.

In Section III, *infra*, the only three cases which Petitioners have identified as being in conflict with the Michigan Court of Appeals are specifically addressed. Even a cursory analysis of those cases demonstrates that there is no serious conflict in principle created by the opinions in those cases. Moreover, it is clear that a number of federal circuit and state courts, which have directly addressed the relevant parcel issue, reject the notion that discrete portions of a larger property must be viewed separately in measuring the impact of a government regulation. *See, e.g., MacLeod v. Santa Clara County*, 749 F.2d 541, 547 (9th Cir. 1984), *cert. den.* 472 U.S. 1009 (1985); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1430 (10th Cir. 1986), *cert. den.* 480 U.S. 951 (1986) (*citing MacLeod, supra*); *Naegele Outdoor Advertising v. City of Durham*, 844 F.2d 172, 176 (4th Cir. 1988); *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 74 (1997); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 533 (Wis. 1996).

In addition to these cases, and of particular relevance to the underlying case, are a series of takings cases based on actions taken by the federal government under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*. These cases are significant because they involve the same kind of government action which is the subject of the Petitioners' takings claim, *i.e.*, permit denials for wetland fill. Importantly, all of these cases repudiate the existence of any legal authority or public interest

justification for the Petitioners' proposed per se rule requiring that discrete portions of affected property be parsed out from a larger whole.

Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), *cert. den.* 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981), *cert. den.* 455 U.S. 1017 (1982); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); and *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993), each involved the application of § 404 of the CWA to property that contained both wetland and upland. In none of these cases did the courts consider the denial of a permit to fill a wetland an, "attempt to carve out a discrete portion of the owner's property and require it to be devoted to some public use",[11] mandating compensation for those specific wetland areas.

The discussion of the relevant parcel issue in *Ciampitti* and *Tabb Lakes* is particularly instructive. *Tabb Lakes* involved a temporary taking claim based on the improper assertion of jurisdiction by the Army Corps of Engineers.[12] In responding to the claimant's argument that all use of certain areas of the property had been taken the court held:

> Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto constitute a taking in every case where it exercises its statutory authority.[13]

Similarly, in *Ciampitti* the Court of Claims reasoned:

> In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity

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11 *See, e.g.*, Petition, p. 16.

12 10 F.3d at 799.

13 *Id.* at 802.

> required a buffer, for example, around a housing development, a court would not entertain a separate claim for the land dedicated to the buffer. It would no doubt take into consideration the extent to which the whole parcel could be developed.[14]

These cases are directly applicable to the situation presented in the underlying case where Petitioners argue that they should be compensated for the discrete area impacted by the regulation regardless of the large area of developable land remaining on their property. These cases reaffirm the doctrine established in *Keystone* and *Penn Central, supra,* which reject such claims.

III.

PETITIONERS HAS FAILED TO DEMONSTRATE ANY COMPELLING NEED TO ADOPT THE RULE THEY ADVOCATE, AND THE RULE CONTRAVENES SETTLED TAKINGS DOCTRINE.

As discussed above, despite the opportunity to opine on the subject after *Lucas,* in *Concrete Pipe* and *Dolan, supra,* this Court has not indicated any intention to create a special rule for "partial categorical takings" as proposed by Petitioners. Moreover, the federal circuit has directly addressed the issue, and rejected the propriety of such a rule in *Tabb Lakes, supra.*[15] In fact, the emerging rule for defining the relevant parcel, as represented by cases like *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed. Cir. 1994), *Ciampitti,* and *K & K Construction, supra,* is a fact-based inquiry designed to "identify the parcel as realistically and fairly as possible."[16] Such a rule is consistent with traditional takings analysis which has relied on *ad hoc,* factual inquiries and is based on the fundamental underpinning of fairness.

Undaunted, Petitioners seek to demonstrate the need for imposition of a bright-line rule in the context of this case.

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[14] 22 Ct. Cl. at 318.

[15] As discussed in Section III.B., *infra, Loveladies* is not to the contrary.

[16] *See, e.g., Ciampitti,* 22 Ct. Cl. at 319.

However, Petitioners have failed to do so, in large part because their arguments are based on mischaracterization of the government action at issue and the application of inapposite jurisprudential principles.

As noted in MDEQ's statement of the case, Petitioners take great pains to characterize the permit denial at issue as a physical taking with the obvious aim of shoehorning this case into the analysis employed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and its progeny, where the determination of the relevant parcel is irrelevant. However, the record clearly discloses that this is not a physical takings case because there has been no physical occupation nor is there any support for Petitioners' assertion that MDEQ has "exercised complete dominion and control." Despite Petitioners' characterization to the contrary,[17] the fundamental underpinning of *Loretto* is the loss of the right to exclude others,[18] which is simply not at issue in this case.

Unlike a physical taking, the restriction in this case is precisely analogous to setbacks, buffer zones, height restrictions, septic requirements, etc., which preclude development of specific areas or segments of property, and control where and how property is utilized. Such restrictions have long been upheld despite the significant use limitations they impose, and the cases have been decided by reference to the whole property and the uses that remain.[19] An exception such as that proposed by Petitioners, based on the "independent economic viability" of the discrete portion of property subject to the regulation, would turn traditional parcel analysis on its head. Such micro-examination of areas or segments of property impacted by regulation, without reference to the larger whole, is antithetical to the parcel-as-a-whole principle established by this Court because it places the focus on what was taken without any point of reference.[20]

[17] Petition, p. 17. ("Although usually classified as a 'physical invasion' case, *Loretto* is perhaps better characterized as one in which the state dictated the specific use to which part of Mrs. Loretto's property would be devoted.")

[18] 458 U.S. at 435.

[19] *See, e.g., Gorieb v Fox*, 274 U.S. 603 (1927).

[20] It is significant that, to MDEQ's knowledge, this "test" has never been applied by a court.

Petitioners have failed to demonstrate any compelling reason to alter established takings jurisprudence and create a new rule to accommodate their taking claim. This is not a physical takings case and there is nothing to distinguish the permit denial at issue from any of a range of legitimate government actions which impact the use of a portion of a larger property. Accordingly, there is no reason to analyze this case, or others like it, any differently.

IV.

THERE IS NO CONFLICT BETWEEN THE VARIOUS STATE COURTS OR THE FEDERAL CIRCUIT COURTS NECESSITATING THE INVOLVEMENT OF THIS COURT.

Recognizing that this Court must reserve its oversight to cases of significant jurisprudential importance, Petitioners seek to create a conflict worthy of this Court's attention. This effort fails, not only because the conflict constructed by Petitioners, one state court out of fifty and two federal circuit courts, would be insignificant, but, more importantly, because the conflict is illusory.

A. The Oregon Supreme Court's Decision In *Boise Cascade Corp. v Board of Forestry* Was Limited To The Interpretation Of The Oregon Constitution And Did Not Directly Address The Relevant Parcel Issue.

Petitioners argue that in *Boise Cascade Corp. v Board of Forestry*, 935 P.2d 411 (Ore. 1997), the Oregon Supreme Court, "arrived at precisely the opposite conclusion from the court below on the application of *federal constitutional law*." Petition, p. 20 (emphasis added). Further, that "the Oregon Supreme Court (correctly) applied the *Takings Clause* in a manner completely contrary to the doctrine of the Michigan court below. Petition, p. 21 (emphasis added). This characterization of the holding in *Boise Cascade* is simply not accurate. Although the claimant in that case brought its claims

under the Oregon[21] and United States Constitutions, the decision of the Oregon Supreme Court was expressly limited to the state constitution:

> In order to determine whether the complaint states a claim for relief, we must first discern what is required to establish a "takings" claim under Oregon law.[13]

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[13] This Court considers state constitutional claims before considering federal constitutional claims. *State v Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983); *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981).

It is also significant that the limited issue before the court was whether the claimant's allegations in that case were adequate to survive a dismissal motion based on the failure to state a claim, "Assuming the truth of all well-pleaded facts alleged in the complaint and giving plaintiff the benefit of all favorable inferences that may be drawn from those facts. . . ." *Boise Cascade* at 420. Among the allegations cited by the court was the somewhat unfocused allegation that, "*Apart from the the subject merchantable timber, the underlying commercial forest land has no separate economic value until the timber has been logged.*" *Id.* n. 14 (emphasis in the original). Moreover, there is no direct discussion of the relevant parcel issue.

The premise of Petitioners' conflict argument is, "It is antithetical to our constitutional form of government that rights secured under the Fifth Amendment should be protected in some states but not in others." Petition, p. 21. Although true as a general principle, Petitioners' reliance on the Oregon Supreme Court's decision in *Boise Cascade* does not support this premise because that decision was based on the Oregon Constitution and did not determinatively decide the relevant parcel issue.

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[21] Oregon Constitution, Article I, section 18.

B. The Holding In *Loveladies Harbor* Is Not In Conflict With The Michigan Court Of Appeals Opinion.

Petitioners assert that the holding in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), "stands in stark contrast to the approach of the Michigan courts in the present case." Petition, p. 23.[22] This alleged conflict is apparently based on the Petitioners' view that *Loveladies* is supportive of the new "partial categorical takings" rule they advocate because the court "focus[ed] . . . on the property actually carved out for dedication to a public use by the operation of land use regulations, ..." *Id.*

Loveladies involved a permit to fill wetlands on a 250-acre parcel, which had originally been purchased in 1958, and 199 acres of which had been developed and sold prior to enactment of the relevant regulation.[23] 28 F.3d at 1173-1174. Of the remaining 51 acres, 38.5 acres had been dedicated to the State of New Jersey in exchange for a state permit to develop the remaining 12.5 acres. *Id.* When the applicant then applied to the federal government for a permit to develop the 12.5 acres, the state strenuously objected to the permit and the federal government ultimately denied it. *Id.*

It was based on this distinctive set of facts that the Federal Circuit determined that the relevant parcel was the 12.5 acres and that a taking had occurred because no development could take place in light of the permit denial. *Id.* at 1181. It is not the case that the Federal Circuit simply focused on the 12.5 acres for which the permit was sought and

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[22] This assertion is somewhat ironic in that the Court of Appeals relied upon *Loveladies* in excluding (albeit erroneously) over half of the Petitioners' original 50-acre parcel from its takings analysis. It is also ironic that *Loveladies* is often cited for a "flexible," fact-based approach to determination of the relevant parcel which is arguably similar to the "inherent[ly] factual inquiry" outlined by the Michigan Supreme Court in *K & K Construction, supra*. 456 Mich. at 580. Although the Michigan Supreme Court "disavowed" the Court of Appeals reliance on *Loveladies* (*see*, 457 Mich. 884; Petitioners' Appendix A) this was likely in large part due to the erroneous factual basis for the Court of Appeals determination that 26 acres of the 50-acre property should be excluded from the relevant parcel. In fact, *Loveladies* is cited with approval by the Michigan Supreme Court in outlining various factors of importance in determining the relevant parcel. 456 Mich. at 585 n. 10.

[23] Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

denied, without any further analysis. Accordingly, the Michigan Court of Appeals properly distinguished the facts of the underlying case, where Petitioners still owned 24.6 acres of property and could develop 18.6 acres of that parcel,[24] from *Loveladies* where 199 acres had been sold before the enactment of the relevant regulation[25] and prior to the permit application 38.5 acres "for all practical purposes had been promised to New Jersey in exchange for the NJDEP permit."[26]

The Michigan Court of Appeals decision was entirely consistent with *Loveladies* and, in fact, the Court relied on *Loveladies* in excluding 26 acres of Petitioners' property from the relevant parcel. Thus, *Loveladies* does not provide any basis for Petitioners' conflict argument.

C. *American Savings And Loan Association v. County of Marin* Is Of Dubious Precedential Value.

The final case cited by Petitioner as presenting a conflict with the Michigan Court of Appeal's determination in the instant action is *American Savings And Loan Association v. County of Marin,* 653 F.2d 364 (9th Cir. 1981).

The primary reason *American Savings and Loan* does not support Petitioners' conflict argument is that two subsequent decisions in the Ninth Circuit call into question its continuing validity. In *MacLeod v. Santa Clara County, supra,*[27] a panel of the Ninth Circuit Court of Appeals took a position contrary to the holding petitioner has attributed to the *American Savings and Loan* panel. Relying on *Penn Central* the panel held that government action which denied the use of a portion of a claimant's property did not necessarily result in a taking:

> The Supreme Court has long since rejected any contention that denial of the use of a portion of a parcel of property is so bound up with the

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[24] 214 Mich. App. at 74; Petitioners' Appendix B-7.

[25] 28 F.3d at 1174.

[26] *Id.* at 1181.

[27] 749 F.2d 541 (9th Cir. 1984); *cert. den.* 472 U.S. 1009 (1985).

> investment-backed expectations of a claimant that government deprivation of the right to use a portion of the property in issue invariably constitutes a taking, irrespective of the impact of the restriction on the value of the parcel as a whole.[28]

Subsequently, in *Zilber v. Town of Moraga*, 692 F.Supp. 1195 (N.D. Cal. 1988), the District Court for the Northern District of California rejected an argument based on *American Savings and Loan* because the court determined it was likely not still good law in light of this Court's subsequent decision in *Keystone, supra*:

> In *Keystone*, the Supreme Court essentially rejected the *American Savings* court's notion that segments of property may be analyzed separately if a "nonuniform regulation" affects various segments differently.[29]

These two subsequent decisions from the Ninth Circuit strongly indicate that *American Savings and Loan* is no longer law in that Circuit. At a minimum, they call into question Petitioners' assertion that a conflict exists between the Michigan courts and the Ninth Circuit and that any such conflict warrants review by this Court.

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[28] *Id.* at 547.

[29] 692 F. Supp. at 1205.

CONCLUSION

The underlying opinion of the Michigan Court of Appeals, on which Petitioners base their request for certiorari, does not represent the law in Michigan concerning the proper determination of the relevant parcel in a takings case. It would seem incongruous for this Court to review an intermediate appellate court decision of limited precedential value.

Moreover, the decision of the Michigan Court of Appeals clearly falls within the parameters established by this Court for determination of the relevant parcel, arguably erring on the conservative side by excluding half of the property owned by Petitioners. *Keystone, Concrete Pipe,* and *Dolan* establish that this Court will not simply focus on the area, right, or thing alleged to have been taken without considering the potential larger whole against which to measure the economic impact of a government action. This interpretation is confirmed by numerous federal cases specifically dealing with the takings implications of wetlands regulations. *See, Deltona, Ciampitti,* and *Tabb Lakes, supra*. The various policy arguments proffered by Petitioner in an attempt to counter the lack of legal authority for their position are inapposite and do not justify deviation from an established body of law.

Similarly, the asserted conflict with the Oregon Supreme Court, the Federal Circuit and the Ninth Circuit is not supported by the cases themselves. *Boise Cascade, supra,* was decided based on takings principles contained in the Oregon Constitution and did not squarely address the relevant parcel issue. There is no conflict with the Federal Circuit because the Michigan Court of Appeals relied upon *Loveladies,* in part, and properly distinguished the underlying case from the distinctive circumstances present in that case. Finally, *American Savings and Loan* is likely no longer of any precedential value in the Ninth Circuit.

Based on the foregoing this Petition presents no issues worthy of consideration by this Court. Accordingly, MDEQ respectfully submits that the Petition should be denied.

Respectfully submitted,

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No. 98-388

In the

Supreme Court of the United States

October Term, 1998

RUSSELL H. VOLKEMA and LOIS J. VOLKEMA,
Petitioners,

v.

STATE OF MICHIGAN; DEPARTMENT OF NATURAL RESOURCES; and ROLAND HARMES, Director of Department of Natural Resources,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.6, petitioners Russell H. and Lois J. Volkema (Volkemas) hereby reply to the Brief of Respondents in Opposition (Opp. Brf.) filed by respondents State of Michigan, *et al.* (State), on November 4, 1998.

The petition for certiorari asks this Court to take up a question raised but left unanswered in *Lucas v. South Carolina Coastal Council*:[1] whether *Lucas'* categorical takings rule should apply when the government eliminates all private beneficial use of a discrete, independently viable segment of real property and effectively dedicates it to public use for wetlands preservation.

This case does not involve the denial of one specific use of the entire property, as in *MacLeod v. Santa Clara County*.[2] It does not involve a requirement for setbacks or buffer zones, as the State attempts to argue by analogy. Opp. Brf. at 6. It most certainly does not involve a contractual dispute such as that in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*,[3] relied on heavily by the State although that case involved no loss of economically viable use of any part of any property. As will be shown in greater detail below, there are no factual or procedural irregularities in this case and the serious conflicts among the state and federal courts on this important constitutional question continue to spread. This is the time for the Court to take up and resolve the question it left open in *Lucas*.

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[1] 505 U.S. 1003, 1016 n.7 (1994).

[2] 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985), cited in Opp. Brf. at 7, 14.

[3] 508 U.S. 602 (1993), cited in Opp. Brf. at 6, 9, 16.

I

THERE ARE NO FACTUAL OR PROCEDURAL IRREGULARITIES TO THIS CASE AND THE FEDERAL CONSTITUTIONAL ISSUE IS SQUARELY AND CLEANLY PRESENTED

At the outset of its Opposition, the State contends that this case involves "unique facts" and a "procedural posture" that are somehow inconducive to resolving the question presented for review. Opp. Brf. at 3. This claim turns out to be based on nothing more than the fact that the Michigan Supreme Court denied the Volkemas' petition for review with comments, rather than denying it without comment. *Id.* at 3-4. However, the precise form of the denial of the Volkemas' petition for review is inconsequential both with respect to this Court's jurisdiction and the fitness of the question presented for review. It is well-settled that an order denying discretionary review by a state's highest court, even though it includes commentary "relat[ing] to the merits or correctness of the judgment below," satisfies the finality requirement for a petition for certiorari to review the decision of the intermediate state court under 28 U.S.C. § 1257.[4]

The State seems to believe that this Court grants certiorari to review "controlling authority . . . in the State of Michigan" on the question presented in the petition for certiorari. Opp. Brf. at 3. This is, of course, erroneous. Certiorari is granted only to address the particular constitutional issue presented by the specific decision below. The fact that the Michigan Supreme Court may have committed analogous errors in *K & K Construction*, and so noted in its order denying review in the present case, has no bearing whatsoever on the fitness for review by *this* Court of the question presented in the petition for certiorari in *this* case.

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[4] Robert L. Stern, *et al.*, Supreme Court Practice § 3.12 (7th ed. 1993) (citing *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923)).

Similarly, the effect (if any)[5] of the Michigan Supreme Court's comments on the "precedential authority" of the decision below in the State of Michigan, Opp. Brf. at 4, is irrelevant either to this Court's jurisdiction or the fitness for review of the question presented. The decision below is published in the official reports, 542 N.W.2d 282 (1995), and stands as binding authority on trial courts in the State of Michigan. This Court has, in appropriate circumstances, granted certiorari and reviewed *unpublished* decisions of state appellate courts that had no precedential effect at all, because of the importance of the constitutional issues involved.[6] The ambiguous reservations

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[5] The State claims that the Michigan Supreme Court "expressly disavow[ed], at least in part," the analysis of the court below. Opp. Brf. at 4. In fact, the state high court commented:

> The Court of Appeals' analysis, particularly its reliance on *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (1994), is disavowed insofar as it is inconsistent with this Court's decision in *K & K Construction*.

Petition for Certiorari, Appendix (App.) A-1. However, petitioners have argued that *Loveladies Harbor* actually *conflicts* with the decision below (see Petition for Certiorari at 22-23; Reply Brief, *infra*, at 7-8). Thus, disavowing any purported *reliance* on that decision would be singularly irrelevant to the question presented by Petitioners to this Court. Other than the reference to *Loveladies*, neither the Michigan Supreme Court nor the State suggest any way in which the decision below might be inconsistent with *K & K Construction*, so the purported "express disavowal" was apparently without any practical effect.

[6] *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (certiorari granted to review unpublished disposition of California Court of Appeal). Interestingly, the state appellate court in *First English* had merely applied what was then the "controlling authority on the issue" in the State of California:

(continued...)

expressed by the Michigan Supreme Court in its order denying review in the present case should have no impact on this Court's decision to grant certiorari.

II

THERE IS A GENUINE AND GROWING SPLIT OF AUTHORITY AMONG THE STATES AND LOWER FEDERAL COURTS ON THE IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW PRESENTED BY THIS CASE

The State's Opposition seeks to downplay the serious conflicts among the state and federal courts identified in the petition for certiorari. Opp. Brf. at 11-15. In fact, these conflicts are spreading at an alarming rate. In a case decided after the petition was filed, but available to the State at the time it was preparing its Opposition, the Commonwealth Court of Pennsylvania has joined those courts in direct conflict with the decision below. In *Machipongo Land and Coal Co., Inc. v. Commonwealth of Pennsylvania*,[7] the Pennsylvania court denied summary judgment to the state on a takings claim alleging that environmental regulations had eliminated all use of discrete segments of land comprising 2%-8% of plaintiffs' total holdings. The rule adopted by the Pennsylvania court is virtually identical to the rule the Volkemas have urged on this Court in the present case: the relevant property interest for takings analysis is the discrete segment carved out by regulatory action, ***provided*** the plaintiff can affirmatively prove the following:

1. the regulated land had value prior to the regulation;

2. the regulated land has a separate use from the non-regulated contiguous parcel(s); and

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[6] (...continued)
the California Supreme Court's decision in *Agins v. City of Tiburon*, 598 P.2d 25 (1979), overruled by this Court in *First English*.

[7] 1998 WL 667670 (Pa. Commw.), as amended October 1, 1998.

3. the regulated land has been deprived of all economic benefit to the owner.[8]

By adopting the rule proposed by the Volkemas, the Pennsylvania court stands in stark conflict with the court below, adding to the growing nationwide dissention on the categorical partial takings issue.

This new conflict magnifies the significance of those conflicts previously identified in the petition for certiorari, none of which has been seriously called into question by the State's Opposition.

A. *Boise Cascade Corp. v. Board of Forestry* Was Decided on Federal Constitutional Grounds and Reached a Conclusion Precisely the Opposite of the Decision Below

The State's Opposition argues that *Boise Cascade Corp. v. Board of Forestry*[9] does not conflict with the decision below because it was decided on independent state grounds. Opp. Brf. at 11. However, the *Boise Cascade* opinion does not support such a claim. The federal Fifth Amendment takings question was both raised and decided in *Boise Cascade*:

> On February 1, 1993, plaintiff filed this inverse condemnation action in Clatsop County Circuit Court, alleging that the Board's application of its administrative rule constituted a "taking" under Article I, section 18, of the Oregon Constitution, ***and under the Fifth Amendment to the United States Constitution.***[10]

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[8] *Id.* at 7.

[9] 935 P.2d 411 (Or. 1997).

[10] *Id.* at 415 (emphasis added).

> Both this court ***and the United States Supreme Court*** have recognized that, under certain circumstances, a "temporary" taking of all economic use of a piece of property may constitute a "taking" under the pertinent provisions of the state ***and federal*** constitutions.[11]

The fact that the Oregon Supreme Court determined that the defendant Board's actions violated the Oregon Constitution *in addition to* creating a federal takings claim under the Fifth Amendment in no way compromises the fact that the state's highest court ruled on the basis of its interpretation of federal constitutional law.

The State also claims that *Boise Cascade* "did not directly address the relevant parcel issue." Opp. Brf. at 11. This is a curious assertion, since the Oregon Supreme Court was expressly called on to rule whether a Fifth Amendment takings claim could be set forth by allegations that environmental regulations had eliminated economically viable use of a discrete 56-acre segment of a 64-acre parcel.[12] Later in its Opposition, the State modifies its argument to: "there is no *direct discussion* of the relevant parcel issue." Opp. Brf. at 12 (emphasis added). By this, the State presumably means that the Oregon Supreme Court did not set off a section of its opinion with the heading, "Relevant Parcel Issue." But this is because this issue informs and underlies the bulk of the opinion; *Boise Cascade* has no meaning ***except in the context of the categorical partial taking issue***. Finally, the State complains that *Boise Cascade* did not "determinatively decide the relevant parcel issue," since the case had gone up from the granting of a demurrer. Opp. Brf. at 12. This misses the point of the conflict with the decision below. In Oregon, under *Boise Cascade*, plaintiffs are entitled to go to trial

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[11] *Id.* at 420, citing to *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (emphasis added)).

[12] *Id.* at 420.

on a takings claim alleging that regulations have deprived them of all economically viable use of a discrete segment of a larger parcel of property. In Michigan, under the decision below, they may not do so. In Oregon, plaintiffs who can prove up their claims at trial will be entitled to compensation under *Lucas*; in Michigan, they will not even have this opportunity, for under the opinion below such claims will be foreclosed as a matter of law. This is a genuine, fundamental conflict that cries out for resolution by this Court.

B. *Loveladies Harbor* Obviously Conflicts with the Decision Below

The State's Opposition asserts that there is no conflict between *Loveladies Harbor, Inc. v. United States*[13] and the opinion below. Opp. Brf. at 13-14. However, the essential conflict between these two cases is obvious. The *Loveladies* plaintiff owned a 51-acre parcel, out of which the government carved a discrete 12.5-acre segment to be dedicated to public use.[14] In the case at bar, the Volkemas own a 24.6-acre parcel, out of which the government carved a discrete 6-acre segment to be dedicated to public use.[15] In *Loveladies*, these facts were found to give rise to a taking;[16] in the case at bar, they were not.[17]

The State finds it dispositive that the remaining 38.5 acres in *Loveladies*, although still privately owned, had been

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[13] 28 F.3d 1171 (Fed. Cir. 1994).

[14] *Id.* at 1180-81.

[15] App. D-1.

[16] 28 F.3d at 1183.

[17] App. B-9.

"promised"[18] to another governmental entity, and seeks to distinguish the two decisions on that basis. Opp. Brf. at 13. However, like the State in the proceedings below, the Corps of Engineers predicated its defense in *Loveladies* on the argument that the entire 51 acres owned by the plaintiffs was the proper measure of the "parcel as a whole" for categorical takings analysis.[19] By rejecting that argument, the *Loveladies* court broke sharply with the rationale urged by the State of Michigan and adopted by the appellate court in the decision below. As Judge Sawyer pointed out in dissent, it is difficult to see any relevance of *Loveladies* to the majority opinion below, other than conflicting with it.[20]

Finally, this fundamental conflict was emphasized by the Michigan Supreme Court which, in its order denying the Volkemas' petition for review, disapproved precisely those portions of the decision below that purported to rely on *Loveladies*.[21]

C. The State's Opposition Highlights Additional Conflicts That Exist *Within* the Ninth Circuit, in Addition to the Conflict Identified in the Petition Between the Ninth Circuit and the Michigan State Courts

The State downplays the significance of the conflicting Ninth Circuit opinion in *American Savings and Loan Association v. County of Marin*,[22] suggesting that this case is of "dubious precedential value." Opp. Brf. at 14. However,

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[18] 28 F. 3d at 1181.

[19] *Id.* at 1180-81.

[20] App. B-13 (Sawyer, J., dissenting).

[21] App. A-1.

[22] 653 F.2d 364 (9th Cir. 1981).

American Savings is still good law in the Ninth Circuit. It has not been overruled, modified, or qualified by any subsequent opinion of that circuit. Indeed, the Michigan Supreme Court cited to *American Savings* in *Bevan v. Brandon Township*,[23] confirming that *American Savings* is still considered good law in the Michigan courts.

What the State actually demonstrates is that there is some dissention *within the Ninth Circuit itself* on the categorical partial taking issue, with at least one district court refusing to follow *American Savings*.[24] Contrary to the State's Opposition, *MacLeod v. Santa Clara County*,[25] cited in Opp. Brf. at 14, does not conflict with *American Savings*. Unlike *American Savings* or the case at bar, *MacLeod* involved the denial of one specific use of the entire property (timber harvesting), rather than the prohibition of *all* use of a discrete, identifiable segment of the land.[26] Thus, the dicta from *MacLeod* quoted in the State's Opposition has no bearing on the question presented by the current petition. At most, all the State has shown is that the disarray and confusion surrounding the categorical partial taking issue reach deep into the federal circuits themselves, as well as giving rise to conflicts among the circuits.

CONCLUSION

The applicability of *Lucas*' categorical takings rule to the regulatory deprivation of discrete, independently viable segments of real property is a pressing and important question of federal constitutional law. It is also the source of widespread conflicts, confusion, and disarray among the Fifth Amendment takings

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[23] 475 N.W.2d 37, 42 (1991).

[24] *See Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988), cited in Opp. Brf. at 15.

[25] 749 F.2d 541.

[26] *See id.* at 543-44.

decisions of the state and lower federal courts. For all of these reasons, and for the reasons stated in the petition for certiorari, Petitioners Russell H. and Lois J. Volkema respectfully pray that the petition be GRANTED.

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Respectfully submitted,

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